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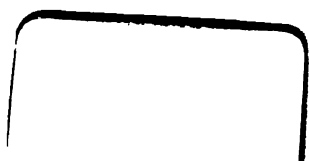
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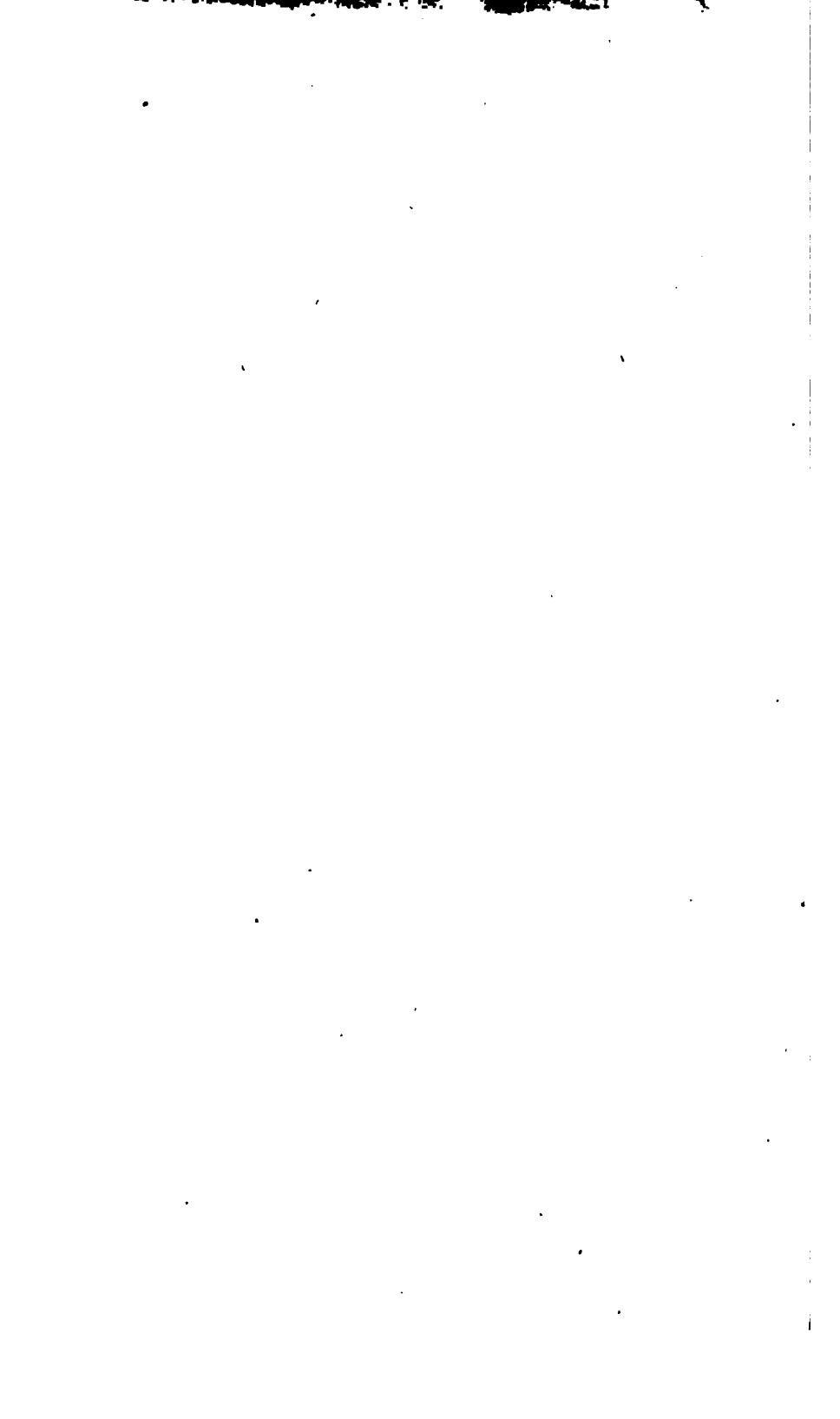
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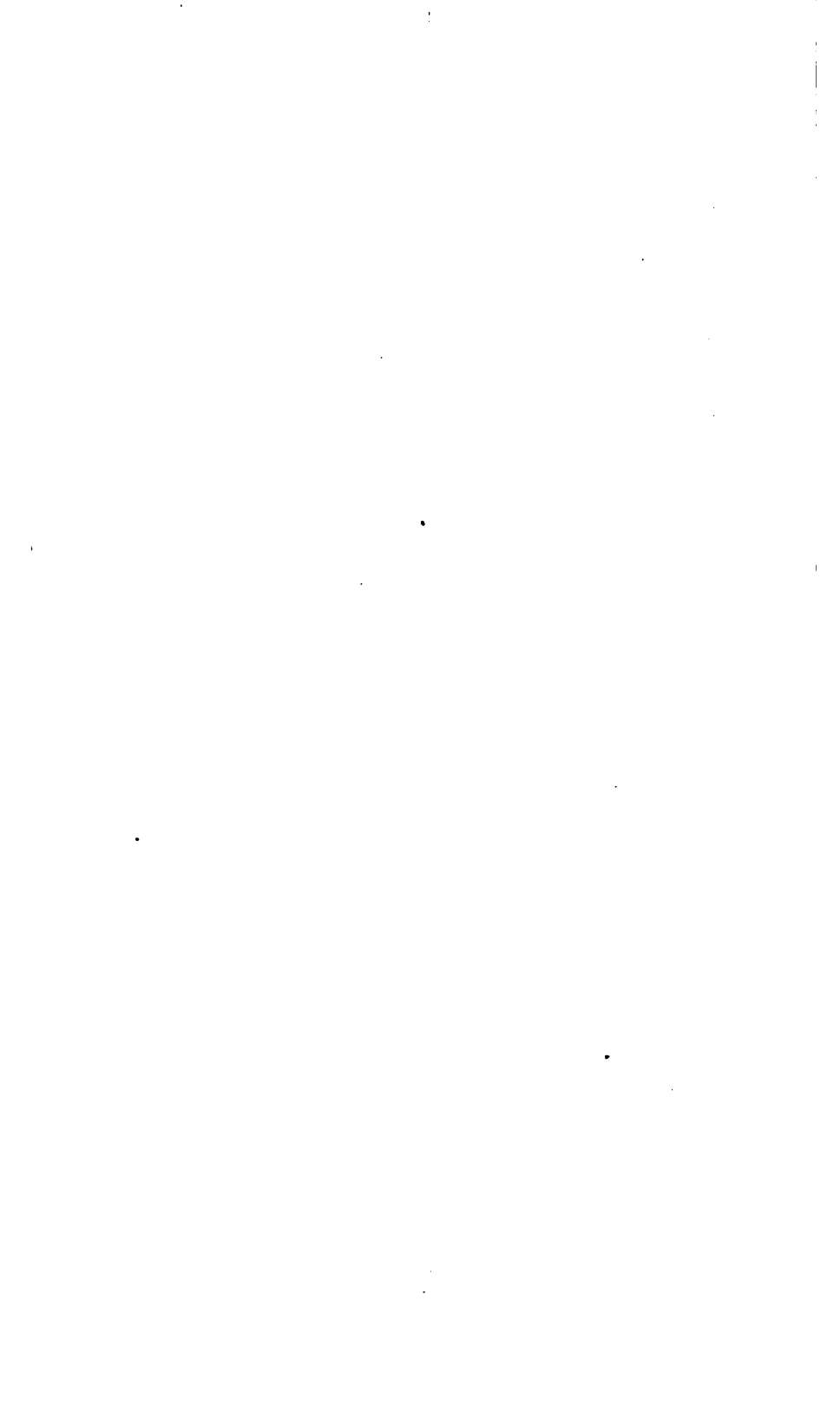
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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

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AMERICAN STATE REPORTS.
VOLUME 102.

(15)



CASES
IN THE
SUPREME COURT
OF
COLORADO.

**REBECCA GOLD MINING COMPANY, LIMITED, v.
BRYANT.**

[31 Colo. 119, 71 Pac. 1110.]

MINES AND MINING—Relocation of Claim.—The mere cancellation of an entry of a mining location does not render the ground open to relocation. (p. 20.)

MINES AND MINING—Conflicting Locations.—If the original locators of a mining claim relinquish it to a junior locator so that the latter may acquire title to it, and he, before intervening rights accrue, takes such steps under the public land laws and the rules of the land department as entitle him to a patent, and on final proof he receives a receiver's receipt, a third person cannot gain a superior right by making a location upon the claim as unappropriated public domain, after the issuance of a certificate of purchase, unless it and the receiver's receipt are legally canceled. (p. 20.)

MINES AND MINING—Conflicting Locations—Vested Rights Under Certificate of Purchase.—If a strip of land between two mining locations is included and described in the location certificate of one of the locators, but when application for a patent is made by him is excluded from his location, and by agreement of the two locators intended to be included in the other locator's claim, the owner of which amends his papers and upon final proof made includes such strip, which is included in the final certificate of purchase to him issued by the land department, but afterward the land commissioner, without notice to such locator, changes the records of his office so as to exclude such strip, and the patent, when issued, does not cover it, and a third person thereafter locates it as another claim while it is in the possession of the holder of the certificate of purchase, under claim of ownership, the attempted cancellation of such certificate of purchase by the land department is void and the holder of such certificate has a vested right to a patent to such strip as against the last locator. (p. 22.)

Am. St. Rep., Vol. 102-2 (17)

Carpenter & McBird, for the appellant.

Gunnell, Chinn & Miller, for the appellee.

¹²⁰ CAMPBELL, C. J. This is an action in support of an adverse claim. A triangular strip of ground in the Cripple Creek mining district was covered by three separate mining locations—the C. O. D., made in 1891; the Rebecca, in 1892; the Helen B., in 1898. The controversy here is between the owners of the Rebecca and Helen B. The evidence is practically harmonious, the case having been tried upon uncontradicted oral testimony ¹²¹ and an agreed statement of facts, and without strict regard to the issues made by the pleadings. The material facts are:

The ground in controversy was included within the C. O. D. location and was described in the location certificate. When application for a patent therefor was filed, which was after the Rebecca location was made, the conflicting territory was expressly excluded therefrom by the applicants, and afterward by the land department from the patent which was issued in 1893. It clearly appears that this strip was by mistake included within the C. O. D. location, and that its owners never at any time made any claim to it. In making application for a patent to the Rebecca lode in 1895, there is apparently some uncertainty upon the part of its owners as to their attitude with respect to this conflicting territory. In one of the papers constituting the application for a patent for the Rebecca, it seems, by mistake of the applicants, to have been excluded. They corrected the error by including it in amended published papers, and when the final proof was made, the officers of the department described it in the final certificate of purchase, or receiver's receipt, acknowledging the payment of the purchase price.

Afterward, and before patent, and because of the fact of this first erroneous exclusion from one of the patent papers, the commissioner of the land office, of his own motion, without notice to the owners of the Rebecca, canceled or changed the records of his office, or caused the same to be done, by excluding from the final certificate of entry this conflicting territory, and when the patent was issued for the Rebecca in August, 1895, it did not contain the same, although the previously issued C. O. D. patent, as well as that application for entry, did not cover it.

After patents had been obtained for the Rebecca ¹²² and the C. O. D. they were recorded, and the two mines conveyed to the appellant mining company, which has, ever since that time, been continuously in possession and working them as producing mines. In August, 1898, from an inspection of these patents by the plaintiff (appellee here), he discovered that the ground, which he subsequently located as the Helen B., though included in the location certificates of both the earlier locations, was excluded from the patents, and he thereupon proceeded to locate the same as the Helen B. claim, and afterward perfected his location in accordance with the statutes, and his title is good, if at the time of his location the territory was unappropriated public domain.

When the appellee sought to obtain a patent for the Helen B., the commissioner of the land office refused to consider his proceeding as an application for that purpose, but remitted him to his rights under the statute in case an application for a patent to the ground was made by other claimants. The various rulings of the department are not altogether consistent, but its final decision with respect to the Rebecca lode was that since, in one of the papers constituting application for a patent therefor, the territory here in conflict was distinctly claimed, and at that time the only apparent adverse interest thereto arose out of its previous location as a part of the C. O. D., and the owners of the latter had never made any claim thereto, but had excluded it in their entry, and the department had also excluded it from the patent, the change by the commissioner of the certificate of purchase of the Rebecca was unauthorized, and the conflicting territory should have been included in the Rebecca patent. But since appellee, as the owner of the Helen B. location, claimed rights in the same property, the owners of the Rebecca were required to readvertise and make application for a patent ¹²³ for their property as if no previous application had been made. And in this connection it is pertinent to remark that the mere cancellation of the entry does not render the ground open to relocation: *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

When, therefore, in pursuance of such directions, appellant proceeded to make application for a patent for the Rebecca lode, including the strip in controversy, the appellee filed his adverse claim and brought this suit in its support.

A number of questions have been argued by counsel which, in the view we take of the case, it is not important to determine. The chief reliance of appellee seems to be that because the disputed tract was covered by the C. O. D., the same being the first location, the locators of the Rebecca claim, being subsequent in time, acquired no right whatever to the conflicting territory; that though the owners of the C. O. D. expressly disclaimed any right to this ground when they applied for a patent and, in fact, at all times, this did not inure to the Rebecca owners so as to attach the alleged abandoned ground to the Rebecca claim; but before the Rebecca owners could acquire any right thereto, it was necessary for them to proceed under the statute to relocate the same as an abandoned claim by filing a new or amended certificate of location, which was not done. The principal authorities upon which they rely are *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, *Oskamp v. Crystal River Min. Co.*, 58 Fed. 293, 7 C. C. A. 233, and 1 *Lindley on Mines*, sec. 363.

It is to be observed that the rule there announced was applied in cases involving the two original overlapping locations, and not to a controversy between the junior of the two original locators and some third party, whose rights as a relocater, if any, afterward arose. At all events, we think that, under the facts ¹²⁴ of this case, the doctrine above contended for does not apply and that there is no ruling in any of those cases inconsistent with the conclusion we have reached as to the validity of the Rebecca lode. When the ground was given up by the C. O. D., its owners had the right to agree with the owners of the Rebecca, which apparently they did, to relinquish the ground claimed by both locations, so that the junior location might acquire title to it, and if the latter, before intervening rights accrued, took such steps under the public land laws and the rules of the land department as entitled him to a patent therefor, and on final proof received a receiver's receipt for the same, a third party cannot gain a superior right by making a location upon it as unappropriated public domain after the issuance of such certificate of purchase. At least, this is true unless such certificate is lawfully set aside by the officers of the government, even though, as between the owners of the two original locations, the owner of the junior one, by failing to comply with some statute or rule of the department, might not prevail.

The Rebecca owners, on the showing made in this record, were entitled to a patent for the land in conflict when the land officers gave them the receiver's receipt describing it, and it is only because the disputed ground was excluded from the patent (improperly, as we hold) that the owner of the Helen B. can claim that it was abandoned by them, hence open to entry as a part of the public domain. Let us examine this contention.

We are clearly of the opinion that the action of the commissioner of the land office in changing the receiver's receipt so as to exclude therefrom the territory in conflict was void. No notice was given by the land department, and none received by the owners of the Rebecca, of this change, and although the patent as issued to them contained no description ¹²⁵ of the excluded ground, nevertheless the record shows that this omission was not known to the owners of the Rebecca until about the time the appellee attempted to make his location, and they were then in actual possession of the premises, working them under claim of right as part of the Rebecca lode described in their final receipt.

It also clearly appears that this disputed territory has been in the possession of, and mining operations therein carried on by, the defendant and its grantors from the time of the location of the Rebecca, and that when appellee attempted to make his location he was aware of that fact, was warned by them that they claimed the ground, and requested not to enter upon it.

We think the general rule as stated in *Swigart v. Walker*, 49 Kan. 100, 30 Pac. 162, that the commissioner of the general land office has, for good cause shown, authority to cancel a final receiver's receipt and set aside the entry any time before patent issues. It is, however, equally well settled as shown in the case of *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122, 32 L. ed. 482, that the supervision possessed by the commissioner is not unlimited or arbitrary, but can only be exerted on a proper showing made, and with notice to the applicant whose entry is attempted to be vacated. There is no claim here that this entry was made upon false testimony, or without authority of law. On the other hand, the records of the land office show that the disputed strip was erroneously and by mistake included within the C. O. D. location by the owners of the latter and that they never made any claim to the same, and intentionally excluded it in their application for a patent. It was evidently in accordance with an arrangement

between them and the owners of the Rebecca that the former made the exclusion and when the owners of the Rebecca applied for, and received, their patent, ¹²⁶ the ground was unappropriated public domain. Under these facts, as against all persons except the government, the Rebecca owners were then entitled to possession, and upon payment of the purchase price and issuance of the receiver's receipt their right to a patent became vested. That receipt vested in those to whom it was issued the right to a patent which has not yet been, and cannot now, on the facts before us, be divested.

The subsequent action of the land department in assuming to cancel this entry to the extent of the ground in conflict was wholly unauthorized and void, as the commissioner of the land office himself subsequently ruled. *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 54, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, has been cited by appellee as sustaining his contention, but we find nothing in that decision to justify it, and, as already stated, we do not think that this case comes within the doctrine of *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, as clearly appears from the comments upon that decision made by Justice Brewer in his opinion in the *Del Monte* case.

We are of opinion that the receiver's receipt for the Rebecca, which the appellant holds has not been lawfully canceled, and that in this proceeding its validity has not been impeached. The judgment of the district court being in conflict with this view, it is reversed and the cause remanded.

The Power to Cancel Entries for public lands by the commissioner of the general land office is not arbitrary or unlimited, and must be exercised according to law: See the monographic note to *Delles v. Second Nat. Bank*, 75 Am. St. Rep. 881; *Whitney v. Spratt*, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919.

The Cancellation of a Mineral Entry only is not *res judicata* on another application for a patent, and the facts found, upon which the cancellation is based, are not admissible to support an adverse claim against a second application for the same premises: *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

Mining Claims are not Subject to Location until the rights of the former locator have come to an end: *Buffalo Zinc etc. Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572. On the abandonment and forfeiture of mining claims, see the monographic note to *McKay v. McDougall*, 87 Am. St. Rep. 403-416.

AJAX GOLD MINING COMPANY v. HILKEY.

[31 Colo. 131, 72 Pac. 447.]

MINES AND MINING—Extralateral Rights.—For all veins, both discovery and secondary, of a patented mining claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines, and such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists, and while the end lines of the location of the claim, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. (p. 30.)

Colburn & Dudley and J. C. Helm, for the appellant.

W. O. Temple and S. D. Crump, for the appellees.

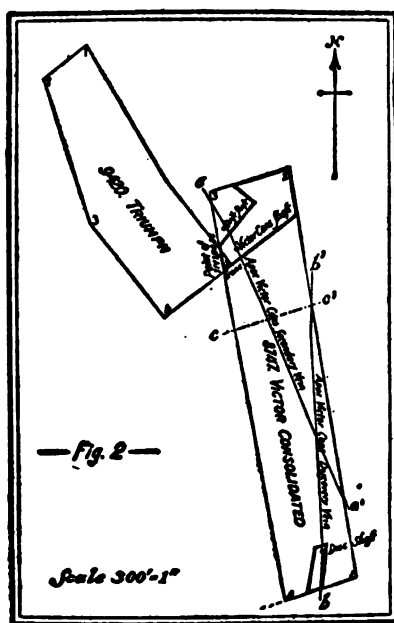
¹²³ **CAMPBELL, C. J.** This is an action by the owner of the Victor Consolidated, against the owner of the Triumph, mining claim, to recover for the value of ores taken from a vein within the limits of the Triumph lode, of which both parties assert ownership. The defendants say the ores belong to them because the vein from which they were extracted is within the outer boundaries of their location, while plaintiff's ownership is based upon an apex right under section 2322 of the Revised Statutes of the United States: U. S. Comp. Stats. 1901, p. 1425. Only one important question is raised by the appeal of the apex claimant, who failed below, and this arises out of the following instruction given to the jury at the instance of the defendants: "If you believe, from the evidence in this case, that the discovery lode of the Victor Consolidated claim passes out of either side line of that claim before reaching the northerly end line of said claim, as originally located, then the rights of the plaintiff to any ore outside the surface boundaries of said claim in any vein having its apex within such claim are limited to two parallel bounding planes, one drawn through the southerly end line of said Victor Consolidated claim as originally located, and the other passing ¹²³ through the said claim parallel to said southerly end line at the point where such discovery vein may have been shown to depart from its side lines, if such departure has been shown."

Both parties agree that by it the jury were, in effect, told that if the discovery vein of a lode mining claim on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure.

The question thus presented seems not to have been expressly determined by the supreme court of the United States or any of the inferior federal or state courts. In the absence of any decision at all construing the act of Congress, we would not have much, if any, doubt as to its meaning. Its language is broad enough to sustain appellant's contention that the owner of a lode mining claim has extralateral rights in and to all veins the top or apex of which lies within its surface lines extending downward vertically, to the extent, at least, of the length of the apex within such boundaries, even though the discovery vein on its strike does not cross both end lines. For the statute provides that owners of such claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

The only express limitation to this comprehensive grant is found in the proviso of the same section, which declares that the right of possession to such outside parts of veins "shall be confined to such portions thereof as lie between vertical planes drawn ¹²⁴ downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

There does not seem to be anything ambiguous or uncertain in this language, and, indeed, appellees' counsel are disposed to concede that, taken literally, it affords some warrant, at least, for appellant's position; but they say that by numerous decisions construing the statute the courts have enunciated several propositions that somewhat restrict its apparent scope. Appellees' position cannot be better presented than in the language of their learned counsel, and a statement of their propositions serves to bring out sharply the respective contentions so ably argued on both sides. The following map will also aid in an understanding of the controversy.



125 The apex of the discovery vein of the Victor Consolidated is represented by b, b' . It enters the claim at the south end line, and its course in the main runs parallel with the claim as surveyed, but passes out through the east side line about one thousand feet from the south end line; a, a' is the vein which, as contradistinguished from the discovery vein, we call the secondary vein, which the evidence tended to show passes diagonally across the location, entering it through the west, and leaving it through the east, side line. The Triumph claim is correctly delineated on the map. If the ore taken from the underground workings of the Triumph was taken from any vein apexing within the Victor Consolidated, as some of the evidence tended to show, it was from this so-called secondary vein. Stating the contention again, in a concrete form, the jury were told of the discovery vein of the Victor Consolidated crossed the east side line at c' , then the rights of the plaintiff to ore outside if its surface boundaries in any vein having its apex therein is limited to two parallel bounding planes, one drawn through the south end line 1,4 of the location, as originally established, and the other passing through the claim at the point where the discovery vein leaves the east line and parallel to the south end line at c, c' . The north end line or

bounding plane of this right is the dotted line c,c', and the south bounding plane the south end line of the location 1,4. Plaintiff's extralateral rights as to all veins within the surface lines were, by this instruction, restricted to that part of the claim south of the line c,c', and in that part between this line and the north end line of the claim he was given none whatever, though about five hundred feet of the apex of the secondary vein was found in this latter segment.

The three propositions of law said to be established by the decisions, of which the fourth one stated ¹³⁶ by appellees is said to be a necessary corollary, are:

1. There can be but one set of end lines or bounding planes for a single location, and these limit the extralateral right upon all lodes or veins apexing therein.

2. These end lines or bounding planes are determined by the strike of the discovery vein with reference to the located side and end lines of the claim.

3. Where the apex of the discovery vein passes through one end and one side line, the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end line and another vertical plane parallel thereto, but operating at the point where the apex leaves the side line.

The fourth proposition they thus express: "The necessary logical sequence of these propositions is, that where the discovery vein on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure."

Since appellant concedes the first three propositions, there is no necessity for discussing them or citing the authorities upon which they rest. But the alleged deduction therefrom appellant vigorously combats, and that presents the question for our decision. We first observe that that part of appellees' argument to the effect that where a location is laid across, instead of along, the discovery vein, the end lines become the side lines of the location, and the side lines become the end lines, is not pertinent to anything now before us, and in so far as the deduction depends on such proposition, it is without support. There is no dispute between counsel as to this doctrine of shifting of side and end lines in the case supposed, but it is wholly inapplicable here, for the Victor Consolidated location is laid along the course ¹³⁷ of the discovery vein, and this vein enters the claim through the south end line, and passes out under the east side line. Besides this, the location is patented, and

there is authority for saying that its end lines, as chosen by the locator and described by the patent, are, for all purposes and under all circumstances, to be taken as the fixed end lines.

But conceding the correctness of all three propositions, as to which the counsel upon both sides are in accord, we cannot agree with learned counsel for appellees in their ingenious argument that the fourth proposition, which they must establish in order to sustain the instruction complained of, is a logical sequence of either, or all, of the others. It is quite true that there can be but one set of end lines for one location, and these must perform that function not only for the discovery vein but for all other veins apexing within the surface lines: *Del Monte etc. Co. v. Last Chance etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; *Walrath v. Champion Min. Co.*, 171 U. S. 293, 297, 308, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights. In the *Walrath* case, *supra*, which was twice before the circuit court of appeals (63 Fed. 552, 19 C. C. A. 323, 72 Fed. 978) and once before the supreme court of the United States, there are some expressions in the opinions of the circuit court of appeals from which, taken alone, it might be inferred that under facts like those here present, the owner of a claim would have extralateral rights in the discovery vein even beyond the point where, on its strike, it leaves the side line, and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end ¹³⁸ lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side line, so that, for our present argument, we assume that to be the true doctrine.

The end lines constitute a barrier beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein, and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights the locator cannot, in any case, pursue the vein on its dip beyond the bounding planes drawn through the end lines, but, as we have said, appellant is content to be restricted in the exercise of such rights in the secondary vein to planes drawn parallel to the end lines and passing, the one through the

claim at the point where the vein enters, and the other where it departs from, the surface line of the location. The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end lines—and only so when the vein passes across both end lines—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into, and departs from, the same.

It would seem, therefore, necessarily to follow that the extralateral right depends, *inter alia*, upon the extent of the apex within the surface lines, and while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral ¹⁸⁰ rights under this rule can easily be ascertained. The apex of a secondary vein need not be in the same portion of the claim as is the apex of the discovery vein. The statute does not say so. The decisions heretofore made certainly do not so require. The three propositions deduced from these decisions do not logically lead to that doctrine. While, as we have said, there is no decision upon the exact point, yet we think there are cases, in addition to those already cited, which necessarily lead to this conclusion, among which are *Consolidated Wyoming G. Min. Co. v. Champion Min. Co.*, 63 Fed. 540, 546. While this court, in *Catron v. Old*, 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687, criticised this case, it did not do so as to the point now under consideration. It was with reference to the doctrine of comparative direction of the lode which left to the jury, as a question of fact, whether a vein extends more along, than across, the claim, that the criticism went; and we there said this introduced an element of uncertainty which, if possible, should be avoided: See, also, *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803, affirmed by the United States supreme court, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87; *Tyler Min. Co. v. Last Chance Min. Co.*, 71 Fed. 848; 2 *Lindley on Mines*, sec. 591 et seq.

The language of Judge Hallett, when *Del Monte etc. Co. v. New York etc. Co.*, 66 Fed. 212, was before him, is pertinent to the argument of appellees that there can be but one set of

end lines or bounding planes for all the veins covered by a single location, and that they must be the same for each. He thus disposes of it: "It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties: *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98. This, however, is not necessary. We ¹⁴⁰ can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it."

The opinion of Mr. Justice Brewer, when the same case came before the federal supreme court (*Del Monte etc. Co. v. Last Chance etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72), is very instructive, and, as we read it, is authority for the conclusion which we have reached in the case in hand. In speaking of extralateral rights of a vein entering a claim through an end line and passing out under a side line, he said: "Given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course, outside the vertical side lines." And referring to the proviso of section 2322, which we have hereinabove quoted, he proceeds: "This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. . . . Naming limits, beyond which a grant does not go, is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not, in such pursuit, go beyond the vertical end lines. And this is all that the statute provides."

This reasoning applies as much to a secondary, as to the discovery, vein. It is a vein that apexes within the surface limits, and there is, to say the least, no more reason in denying to it extralateral rights, because it does not apex within that particular part of the claim where the apex of the discovery vein is, than there is for denying to any vein extralateral rights unless in its course it reaches the ¹⁴¹ vertical planes of the end lines. Justice Brewer says this latter condition is not essential to the exercise of extralateral rights, and a fortiori the former is not.

Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end lines of the location, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. The giving of this instruction was prejudicial error. The judgment is, therefore, reversed and the cause remanded.

Extralateral Rights in mining operations are considered in the monographic note to *Catron v. Old*, 58 Am. St. Rep. 263-271. The holder of a mining location within which a vein apexes may follow its dips and angles when it dips and leads without the side lines of his claim as marked on the surface: *Cedar Canyon Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749. See, too, *Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148; *Butte etc. Min. Co. v. Societe Anonyme des Mines*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111. As to the right to follow a vein which crosses two opposite side lines, see *Parrott Silver etc. Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326; and as to the right to follow a vein which enters on an end line and passes out on a side line, see *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803. On cross or intersecting lodes, consult the note to *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 83 Am. St. Rep. 41-44.

WINCHESTER v. JOSLYN.

[31 Colo. 220, 72 Pac. 1079.]

PLEDGES—Unauthorized Sale—Conversion.—If collateral security is sold without authority and purchased by the pledgee, he is not guilty of conversion and the pledgor may either ratify or disaffirm the sale. If he disaffirms it the property remains in the hands of the pledgee as security, subject to the right of the pledgor to redeem by payment of the debt, but if the pledgee, by an unauthorized sale, puts it out of his power to restore the pledged property, he is liable for the amount of the value thereof to the pledgor. (p. 32.)

PLEDGES—Unauthorized Sale—Fraud.—The fact that a pledgee of collateral security purchases it at an unauthorized sale at a grossly inadequate price does not entitle the pledgor, in an action

by the pledgee on the principal debt, to have the issue of fraud in the purchase of the collateral determined, if there is no allegation of fraud in the answer. (p. 33.)

PLEDGES—Unauthorized Sale—Conversion.—If a pledgee purchases collateral security at an unauthorized sale, the fact that he asserts absolute ownership does not constitute a conversion. (p. 33.)

PLEADING AND PROOF—Variance.—If, in an action on a note, defendant sets up in an amended answer a counterclaim based upon breach of contract, but the contract proved is different from the one alleged in the answer, it is not error to direct a verdict for plaintiff, if no request is made to amend the answer to correspond with the proof, although defendant, before testifying, has tendered a second amended answer which has been denied, for want of a proper showing made, in which the contract is alleged in accordance with the proof. (p. 34.)

Temple & Crump, for the appellant.

Lunt, Brooks & Wilcox, for the appellee.

231 STEELE, J. Suit was brought by the plaintiff, Joslyn, against the appellant, Winchester, and others, upon the following promissory note:

"2,500. Cripple Creek, Colo., Feb. 17, 1896.

"Thirty days after date for value received we jointly and severally promise to pay to the order of Geo. A. Joslyn two thousand five hundred dollars, payable at the First National Bank of Cripple Creek, Colo., with interest at the rate of two per cent per month from date until paid.

"**THE WINCHESTER-HOWARD INVESTMENT CO.**

"**JOSIAH WINCHESTER, President.**

"**JOSIAH WINCHESTER.**

"**HERBERT WARNE."**

Credits in the sum of one hundred and fifty dollars, two hundred and fifty dollars, and ten dollars are indorsed upon the note.

It is alleged in the complaint that at the time of the delivery of the note the defendants delivered to plaintiff in pledge to secure its payment certain certificates of stock in certain mining companies, but that, the defendant having failed to pay the interest upon said note and the principal thereof, the said stock was sold at the front door of the First National Bank in Cripple Creek for the sum of ten dollars, and that said amount was credited upon the note.

The defendants answered, admitting the execution of the note and declaring that the said George A. Joslyn caused the said stock to be sold without authority from any of the makers of the

note, and that he was the purchaser of said stock at the sale, and that he converted the said stock to his own use, ²²³ and that the said stock was worth the sum of three thousand dollars. The defendants further answered that the plaintiff failed to perform a certain contract entered into between him and the Winchester-Howard Investment Company, and that by reason of the plaintiff's failure to comply with the said contract, the defendant company had been damaged in the sum of eight thousand dollars.

In the reply, the facts set forth in the answer and counter-claim are denied.

The court instructed the jury to render a verdict in favor of the plaintiff and against the defendants for the sum of four thousand six hundred and ninety dollars and sixty-seven cents, which was done, and the defendant Winchester has appealed to this court.

But two questions are presented for our determination. The sale, not having been authorized by the pledgor, and it not being a judicial sale, is conceded to be illegal. The appellant contends that the action of the appellee in purchasing the pledged property at the sale was tantamount to the conversion of the stock, and subjects the pledgee to an accounting for its fair market value at the time of the conversion. The rule is not as the appellant asserts. When collateral security is purchased by the pledgee, the pledgor has an election to either ratify or disaffirm the sale. If he ratifies the sale, the title to the security becomes absolute; if he disaffirms it, the property remains in the hands of the pledgee as security, subject to the right of the pledgor to redeem by a payment of the debt. When, however, the pledgee by an unauthorized sale puts it out of his power to restore the pledged property, he is liable for the amount of the value thereof to the pledgor. In such case it is not necessary that a tender of the amount of the debt or a demand for the return of the property be made: Jones on Pledges, secs. 570-571a.

²²³ The court refused to permit the defendant to prove that at the time of the sale the stock sold was of the value of about two thousand dollars, and the appellant, on the oral argument, contended that, assuming that there was not a conversion by reason of the purchase by the pledgee, if the transaction was fraudulent, there was a conversion; and that, inasmuch as the property was worth at the time of the sale the sum of two thousand dollars, the fact that the pledgee bid in the property for the sum of ten dollars was evidence of fraud, and that the question should have been submitted to the jury.

If we were to assume that a conversion takes place when a pledgee fraudulently purchases the pledged property at an illegal sale, it cannot avail the appellant, because not only was there no statement of facts constituting fraud in the answer, but there is no allegation of fraud contained therein. The plaintiff in his replication asserted his right to the stock under the sale, and alleged that the stock was of no greater value than the sum of ten dollars. It is insisted that the assertion of absolute ownership is equivalent to a conversion; but we do not think the fact that he has asserted a title he does not possess constitutes a conversion. His mere assertion did not in any way deprive the defendant of his right to redeem and no one is shown to have been injured by the statement.

In the amended answer and counterclaim, the defendant Winchester sets up a contract between the plaintiff (appellee) and the Winchester-Howard Investment Company which the plaintiff it is alleged, failed and refused to carry out, to the damage of said company, in the sum of eight thousand dollars; that the said company has filed its amended answer and counterclaim setting forth the said contract and alleging a breach thereof, and that by reason of the ²²⁴ foregoing facts the said note has been fully paid and satisfied. The replication denied the allegations of the answer. During the trial, and after the plaintiff had rested and while the defendant Winchester was upon the stand he asked leave to file a second amended answer, and the application was denied. In the answer tendered, another and different agreement is set forth, and the defendant Winchester alleged he had entered into a contract with the plaintiff the terms of which the plaintiff had failed to comply with. No showing was made, however, and we cannot say that the court erred in refusing to permit the second amended answer to be filed. Upon the trial the defendant Winchester testified concerning the contract alleged in the answer, but his testimony does not support the amended answer. His testimony supports the contracts mentioned in the second amended answer, and not the one alleged in the answer which is one of the pleadings in the case. No request was made to permit an amendment to conform to the proof, and the court did not err in directing a verdict for the plaintiff.

The judgment is affirmed.

If a Pledgee makes an unauthorized sale and purchase of the property, the pledgor may affirm the sale or regard it as a conversion: See the monographic note to Griggs v. Day, 32 Am. St. Rep. 725.

PEOPLE v. SOURS.

[31 Colo. 369, 74 Pac. 167.]

CONSTITUTIONAL AMENDMENTS—Ratification—Presumption.—After ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state constitution. (p. 35.)

CONSTITUTIONAL AMENDMENTS—Passage by Legislature. If a proposed constitutional amendment is introduced in the Senate, amended without material change, entered in full upon the journal, and passed as amended, then transmitted to the House and without further amendment passed by the House as received from the Senate, enrolled and signed by the presiding officers of both Houses and published in the session laws as thus passed, but entered in full by mistake and clerical error upon the House journal as originally introduced in the Senate without the amendment, it is validly passed and enacted within a constitutional provision requiring proposed constitutional amendments to be entered in full upon the journal of each House, and is not void because of the difference in the journal entries of the two Houses. (p. 38.)

CONSTITUTIONAL AMENDMENTS—Consolidation of City and County.—A constitutional amendment consolidating a city and county government into one and authorizing the people to adopt a charter for their government and to amend such charter and to provide for the election or appointment of municipal officers is not invalid as exempting a portion of the state from the provisions of the constitution and general laws, nor is it repugnant to the constitution of the United States. (p. 43.)

CONSTITUTIONAL AMENDMENTS—Future Contingencies. A constitutional amendment consolidating a city and county government, and authorizing the people to make and thereafter amend a charter for their government, is not invalid as being dependent upon future contingencies. (p. 44.)

CONSTITUTIONAL AMENDMENTS.—If a state constitution authorizes amendments, the article providing for such amendments may itself be amended. (p. 44.)

CONSTITUTIONAL AMENDMENTS.—Unless Satisfied Beyond Reasonable Doubt that the constitution has been violated in the submission of a constitutional amendment, it must be upheld by the courts. (p. 45.)

CONSTITUTIONAL AMENDMENTS—New Article as.—The legislature may lawfully propose a new article to the state constitution to be submitted to the people as an amendment. (p. 49.)

CONSTITUTIONAL AMENDMENTS.—Amendments by implication are permissible to a state constitution, and a constitutional provision limiting the power of the legislature to the proposal of amendments to one article refers to express amendments, and not to amendments by necessary implication. (p. 52.)

CONSTITUTIONAL AMENDMENT may Embrace More than One Subject, and a proposed constitutional amendment need not be restricted, like an ordinary legislative bill, to a single subject. (p. 53.)

CONSTITUTIONAL AMENDMENT embracing several subjects, all of which are germane to the general subject of the amendment, is valid and may be submitted to the people as a single proposition. (p. 56.)

G. Le Roy Stevick, J. W. Mills, H. A. Lindsley, J. A. Rush, G. F. Dunklee, T. M. Patterson and C. S. Thomas, for the petitioner.

P. Rogers, H. M. Orahood, C. J. Hughes, Jr., C. P. Butler, C. B. Whitford, F. W. Parks, R. D. Rees, T. E. Watters and H. B. O'Reilley, for the respondent.

STEELE, J. At the time of the filing of the pleadings in the case, upon the matter being presented, we determined ³⁷⁵ that the burden was upon the respondent to establish the fact that the constitution had been violated in proposing and submitting the amendment. At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people. In the determination of these questions we ought constantly to keep in mind the declaration of the people in the Bill of Rights, "That the people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness"; and we should examine the objections which have been raised against the validity of this amendment from the viewpoint of a fair and liberal construction, rather than from that of one which unnecessarily embarrasses the exercise of the right of amendment. As was said by Judge Handy in 1856, in delivering the opinion of the court in *Green v. Weller*, 32 Miss. 684: "There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot-box, and there can never be danger in submitting, in an established form, to a free people, the proposition whether they will change their fundamental law. The means provided for the exercise of their sovereign right of changing their constitution

should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people; and the best security against tumult and revolution is in the free ³⁷⁷ and unobstructed privilege to the people of the state, to change their constitution in the mode prescribed by the instrument."

We shall first consider the objection raised in the amended answer, that the constitution has been violated because the proposed amendment was not entered in full upon the journals of both Houses and that the bill for this amendment as passed by the Senate was not the bill passed by the House. Section 3 of the amendment, as originally introduced in the Senate and as entered on the journal of the House, is as follows:

"Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex-officio surveyor and said chief of police shall be ex-officio sheriff of the city and county of Denver; and the then [judges of the district court, district attorney] clerk and ex-officio recorder, treasurer, assessor, coroner [and county judge] of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and said district attorney shall also be ex-officio attorney ³⁷⁸ of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged

under such civil service regulations as shall be provided for by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided."

The journal of the Senate discloses that the bill was amended by striking out the words inclosed by brackets, "judges of the district court, district attorney," and "and county judge"; and that after the word "assessor," "and" was inserted. The bill as amended was engrossed and duly transmitted to the House. The House journal shows that the bill was properly referred to a committee, that it was properly read; that it was then referred to the committee of the whole House and again read, referred again to the committee on revision of the House, read for the third time, and passed by a two-thirds majority of the House. In none of the reports or entries in the journals is any mention made of an amendment; and the bill as enrolled, bearing the signatures of the two presiding officers of the legislative assembly, is the same as that published in the session laws, and is the same as that which appear upon the Senate journal. In the case of *In re Roberts*, 5 Colo. 525, this court stated that these journals "possess the character of public records, and as such are admissible ³⁷⁹ as evidence of the proceedings of legislative bodies, and this independently of statutory provisions. Their value as evidence, however, is a question for the courts, and will be affected by the internal evidence which such records furnish as to the system and completeness, or carelessness and slovenliness with which they have been kept." And in the case of *Massachusetts etc. Ins. Co. v. Colorado Loan etc. Co.*, 20 Colo. 1, 36 Pac. 793, this court held that the enrolled bill, properly signed and deposited in the office of the Secretary of State, is prima facie evidence of the due passage of a statute, and that that presumption should prevail unless overcome by something appearing in the record.

It is said that the constitution does not require a proposed constitutional amendment to be enrolled, and that therefore we should not consider the fact that an enrolled bill has been filed with the Secretary of State, but should confine our investigation to the legislative journals; and, if there is a discrepancy between the two journals, that the constitutional provision that the proposal shall be entered in full upon legislative journals has not been complied with. This court, in the *Nesbit* case, while declaring that the enrollment of a proposal is not

required by the constitution, commended the practice of doing so by the legislature because it is likely to insure care and deliberation in considering matters of such great importance. We think we should not be restricted in our investigation to the journals of the two Houses, but should determine, as a matter of fact, from all the evidence which can be produced of a public nature, whether the bill as passed by the Senate and by the House was the same bill. We are satisfied from an inspection of the journals that the bill as passed by the House was the bill passed by the Senate; and we are convinced of this by an inspection of the entries in the House journal, which fail to mention an amendment ³⁸⁰ to the Senate bill, by the enrolled bill, which appears in the office of the Secretary of State and in the session laws, and by the fact that no record appears in the journal of either House that the bill was returned to the Senate for its concurrence in a House amendment. We are also satisfied that the amendment made by the Senate was not a material amendment, that it did not change the purpose or scope of the bill, and made no substantial or material alteration therein.

The constitution of Kansas requires that amendments proposed to the constitution shall be entered upon the legislative journals. Mr. Justice Brewer of the supreme court of the United States, when one of the justices of the supreme court of Kansas, in passing upon the submission of a proposed amendment which had not been entered upon the journals of the two Houses, but had received the signatures of the officers of those Houses and had been voted upon by the people of the state, said: "Is a proposition to amend the constitution in the nature of a criminal proceeding, in which the opponents of it stand as defendants in a criminal action, entitled to avail themselves of any technical error or verbal mistake, or is it rather a civil proceeding in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly we affirm the latter. The central idea of Kansas law, as of Kansas history, is that substance of right is grander and more potent than methods and forms. The two important vital elements in any constitutional amendment are the assent of two-thirds of the legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded because by them certainty as to essentials is secured, but they are not themselves the essentials. . . . Here, also, may ³⁸¹ appro-

priately be noticed the fact that the past tells the same story of omission from the legislative journals of the full text of the proposed amendment as it does by defect in the form of submission. Many amendments have gone before the people, been adopted and acted upon as parts of the constitution, when only the title, scope and object can be found in the journals. Another thought, and we pass from this question. We may not ignore public history. Nearly two years elapsed between the time the proposition passed the legislature and the day of the popular vote. During this time this question was not forgotten. It was discussed in every household and at every meeting. The state was thoroughly canvassed; its merits and demerits were presented and supported by all possible arguments. Pulpit, press and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of submission as would defeat the popular decision. If this objection had been raised prior to the election, the legislature could have been easily convened, and the defect remedied. But there was not a suggestion from friend or foe. The contest was warm and active. After the contest was ended and the election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement and struggle was simply a stupendous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities ³⁸⁸ in the conduct of an election are impotent to thwart the expressed will of such majority": Prohibitory Amendment Cases, 24 Kan. 700.

An inspection of the manuscript journal of the House shows that the printed bill (before amendment) was inserted bodily in the House journal; and it seems clear that the failure to make the change made by the Senate was a mere clerical omission on the part of the employé of the House. This amendment, as were the amendments in Kansas, was discussed for nearly a year before its submission to the people; it bore the indorsement of every political party; it received at the polls more votes than were theretofore cast for any other amendment submitted to the people. It is shown beyond a reasonable doubt that the bill as amended passed the House; and if the will of

the people is to be thwarted by the design or carelessness of an employé of the legislature, then are the foundations of our government unstable and unending.

The objections to the provisions of the amendment itself, and to the extent that it, either necessarily or unnecessarily, changes the existing rules of law applicable to the municipal and quasi-municipal corporations embraced within the territorial limits of the city and county of Denver, are more grave and important than the one just passed upon. It is contended that the proposed amendment violates the provisions of the constitution concerning proposals of amendments by the legislature because: 1. It adds a new article to the constitution; 2. It amends more than six articles of the constitution; if not, it amends more than one article, and amendments to five other articles were submitted by the legislature at the same session; 3. It contains distinct amendments of the constitution that should have been submitted separately; 4. The amendment to the constitution that ³⁸³ authorizes six amendments is itself unconstitutional; 5. It was submitted under a deceptive and misleading title.

It is also contended that the amendment is inoperative and void, even though properly proposed and submitted, because: 1. It violates the provision of the fourteenth amendment to the constitution of the United States that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." 2. It violates the provision of section 4 of the enabling act providing that the constitution shall be republican in form . . . and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. 3. Its operation is dependent upon contingencies.

We shall consider the last three objections before discussing the others.

Under the first objection it is said that some of the adjoining towns have by this amendment lost their public property—that, as the people of these towns had erected town buildings, these town buildings will be taken from them because the towns themselves are consolidated with Denver. That the people of other towns, excluded from the city and county of Denver, have contributed to the erection of public buildings in Arapahoe

county, and that they will lose their share or interest in such public buildings and be required to contribute to the erection of public buildings in a new county. These are incidental and unavoidable conditions, which exist whenever the boundaries of counties are changed or municipalities are consolidated. These municipalities exist for the ³⁸⁴ public convenience, their property is the property of the public, and is held, not as private property, but subject to the changing conditions and requirements of local government. If these changes were dependent upon an act of the legislature, its authority might be scrutinized, but surely it cannot be necessary to inquire into the authority of the whole people thus to appropriate public property to public uses.

The second objection is based upon the construction given by counsel for the respondent to the following provisions in sections 2, 4 and 5 of the amendment:

"The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. . . .

"The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers, who shall have been ³⁸⁵ qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. . . .

"The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided."

Counsel say: "Had it been the intention that the constitution and laws should be in force in this territory, this instrument would have so stated. The language of the above provisions is plain and unambiguous. It has been said that in construing a constitutional provision it will be presumed that every word was weighed and its meaning carefully considered before its insertion in the instrument; and this instrument says that the city and county of Denver can adopt any measure, and shall always have the exclusive power to make, alter and revise their charter. That means everything. If not, why not? This charter is to be the organic law. A legislative act is now the charter of the city of Denver, and the constitution of this state and the laws thereof constitute the organic law of this county. But this instrument changes all this, and says that the charter as framed by the charter convention shall not only be the charter of the city and county, but shall be the organic law thereof. That language means something. It displaces, and was intended to displace, the constitution, the laws, and the general assembly."

If this amendment must be given that construction, it cannot be sustained. Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the constitution, or delegate the making of constitutional amendments concerning ³⁸⁶ it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government. The duties of judges of the district court, county judges, district attorneys, justices of the peace, and, generally, of county officers, are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. Under the constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state such officers as may be necessary to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist.

This distinction between the governmental duties of public officers and their municipal duties is fundamental, and therefore is not avoided or affected by the consolidation.

"Counties, townships, school districts and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the state, which apportion the territory of the state into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state; and, in order that they may be able to perform those duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; the legislature assumes this division of the state to be essential in republican government, and the duties are imposed ³⁸⁷ as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty": Cooley's Constitutional Limitations, *240.

"A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy": 1 Dillon's Municipal Corporations, sec. 23.

The respondent's construction, however, is not that placed upon the amendment by the counsel for the petitioners, or, we assume, by the people. The provision that "Every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable," completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the constitution of the United States.

It is said that the amendment is void because it is dependent upon future contingencies. That the ³⁸⁸ proposal, if valid, became a part of the constitution upon its ratification; whereas, the provisions relative to the creation of a charter for Denver depend upon the will of the people, which may never be exercised. In other words, that the amendment is invalid because it authorizes the people of the city and county of Denver to make a charter and that the people of Denver may never make one. This is not a contingency within the meaning of the law.

It is stated that the proposal was submitted under a misleading and deceptive title. There is no proof that any elector was deceived by the title under which the amendment was submitted, and the proposed amendments were published in full in a newspaper in each county in the state for four weeks preceding the election. In this connection it is urged that the people who voted for this amendment constituted only a minority of the electors of the state and that only about one-third of the electors expressed themselves upon the subject of the amendment. This is not very important, for we should be compelled to sustain this amendment though but a bare majority of the electors had favored it, if, in our opinion, it was legally submitted and ratified, and we should declare it invalid if its invalidity were established beyond a reasonable doubt, although it had received the unanimous support of the electors. It is hard to account for the apparent indifference of the people on the occasion of the submission to them of changes in their organic law. The indifference which prevails in Colorado prevails in other states, and it rarely occurs that a proposed amendment to the constitution receives the attention of more than one-half of those who vote for candidates for office. In the absence of a constitutional provision to the contrary, the people who do not express themselves upon the subject submitted to them are ³⁸⁹ regarded as having assented to a determination by those who do express themselves.

The amendment which authorizes six amendments is attacked because, as it is said, it was not the intention of the framers of our constitution to permit revision and alteration of the constitution except by constitutional convention. The original constitution does not say that the article entitled amendments cannot be amended, but says that the legislature of the state shall not propose amendments to more than one article at one session.

The remaining objections are based upon the respondent's construction of section 2, article 19 of the constitution, which is as follows: "Any amendment or amendments to this constitution may be proposed in either house of the general assembly, and if the same shall be voted for by two-thirds of all the members elected to each House, such proposed amendment or amendment, together with the ayes and noes of each House thereon, shall be entered in full on their respective journals; the proposed amendment or amendments shall be published with the laws of that session of the general assembly, and the Secretary of State shall also cause the said amendment or amendments to be published in full in not more than one newspaper of general circulation in each county, for four successive weeks previous to the next general election for members of the general assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this constitution. Provided, that if more than one amendment be submitted at any general election, each of said amendments shall be voted upon separately and votes thereon cast shall be separately counted the ³⁰⁰ same as though but one amendment was submitted. But the general assembly shall have no power to propose amendments to more than six articles of this constitution at the same session."

In the main we regard the questions presented as judicial, although in the briefs and arguments upon the relevancy of certain provisions of the amendment to its main object or purpose, questions of policy and expediency have been discussed which are legislative rather than judicial; but we are clearly of opinion that the legislature cannot propose an amendment to the constitution not in substantial compliance with its provisions.

It appears to be a universal rule that unless the court is satisfied beyond a reasonable doubt that the constitution has been violated in the submission of a constitutional amendment, the amendment must be upheld. This is not a flexible rule, to be applied to suit emergencies, but is a rule adopted to secure to the people the right they have to change the organic law whenever necessary for their safety and happiness. It means that whenever the will of the people has been ascertained in a manner conforming substantially to the provisions of the constitution, that the court shall brush aside all merely technical obstructions, without regard to the result. It is not prop-

erly applied by merely recognizing and stating it at the beginning of an opinion, and afterward rejecting every liberal doctrine of construction by which learned judges and learned courts have been able to reconcile, and permit to stand, each within its own sphere, constitutional or statutory provisions that appear to be repugnant.

We are not only not satisfied beyond a reasonable doubt that the constitution has been violated, but are of opinion that the amendment proposed can be ³⁹¹sustained upon purely legal principles, supported by adjudicated cases.

It is first contended that the constitution has been violated in this, that the proposal adds a new article to the constitution. It does not appear to be disputed that an amendment may consist in the adding of something new, but it is insisted that that clause of our constitution which prohibits amendments to more than six articles at one session is a limitation upon the power of the legislature, and that no subject not embraced within the existing articles can be added to the constitution in the form of an amendment. In the address to the people of Colorado, the committee of the constitutional convention said: "We have provided liberally for the amending of the constitution, thus giving to the people frequent opportunities of changing the organic law when experience and public policy may require it." The constitution, as it was adopted by the people, contained this provision: "But the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session." If it were intended that no subject except those treated of in the constitution should be included in an amendment thereto, then the language adopted by the framers of the constitution in their address to the people, that frequent opportunities of changing the organic law have been provided, whenever experience and public safety may require it, is, to say the least, misleading. In the constitution itself there is no limitation as to new articles. It provides that any amendment or amendments may be proposed by the general assembly, and, when ratified by the people, shall become a part of the constitution, the only limitation being that the legislature shall have no power to propose amendments to more than one article at the same session. The argument ³⁹²advanced by the relator to the effect that, there being no limitation upon the legislature concerning new articles or subjects, it has plenary power, is convincing, and he has raised in our mind a doubt as to the meaning of the sec-

tion; and if this contention corresponded with the legislative interpretation, we should resolve the doubt in favor of the construction thus contended for. But we are inclined to accept the construction placed upon the constitution by the legislature. In the legislature of 1901, that proposed this amendment, there were twenty-one senators who were members of the Senate that proposed the amendment authorizing six amendments, and they appear to have placed the construction upon their work which prohibits the submission of more than six amendments to the constitution, whether the amendments are to be considered as new articles or as amendments to articles of the constitution as it then existed; and there is abundant authority, not only in this state but in every other state of the Union, to the effect that contemporaneous construction by the legislature of a doubtful or ambiguous provision of the law or constitution should have great weight with the courts. Without regard to the question as to whether the subject embraced in the proposed amendment is a new article or is an amendment to an existing article of the constitution, it seems to us that the legislature, and not the courts, should be the sole judge of the title of the proposed amendment. And it does not seem to us that it can make the slightest difference whether it be termed a new article or an amendment to an existing article. If, as a matter of fact, it receives the votes of two-thirds of the members of each House of the legislature and the constitutional majority of the people, it becomes a part of the constitution. There is no rule of law which requires that a constitutional amendment shall be germane ²⁸³ to the section which it proposes to amend; and no court has ever said that the will of the people shall be overthrown, simply because the legislature, in proposing an amendment has given it a title not germane to the subject. This is the construction placed upon this provision of our constitution by the legislature within a few years after its adoption. In the year 1881 an amendment to the legislative article was proposed. A section of the legislative article provided that the legislature should not pass a law extending the term of office of any public officer, nor law increasing or diminishing his salary or emoluments after his election. An amendment to that section was proposed by the legislature. The amendment provided that the governor should receive a salary of five thousand dollars, that his private secretary should receive a salary of fifteen hundred dollars, that the judges of

the supreme court should each receive a salary of five thousand dollars, and that the district judges should each receive a salary of four thousand dollars. The amendment was ratified by the people and is now a part of the constitution; and the governor, his private secretary, the judges of this court and the judges of the district court have, since the year 1882, when said amendment was ratified, been receiving salaries in accordance with that provision of the constitution.

Here was an amendment to a section which prohibited the legislature from passing a law increasing the salaries of persons in office, and the people amended that section by declaring that the governor and his private secretary, the judges of the supreme court and the district judges, should receive a certain stipulated salary and that those in office at that time should receive the salary therein named. The amendment had not the slightest connection with the subject of the section amended, and yet it has never ³⁹⁴ been questioned, and has remained a part of the constitution until this day.

The people of Illinois in 1886 added to their constitution what is termed a special section, which embraces a new subject and one not contained in any other article of the constitution. This amendment was submitted to the people of Illinois under a joint resolution of the legislature in the following words:

"Resolved by the Senate, the House of Representatives concurring herein, That there be submitted to the people of the state of Illinois for their ratification, or rejection, at the next general election for members of the general assembly, the following additional amendment to the constitution:

"Resolved, That hereafter it shall be unlawful for the commissioners of any penitentiary, or other reformatory institution in the state of Illinois, to let by contract to any person, or persons, or corporations, the labor of any convict confined within said institution."

In Illinois, with identically the same powers and limitations as to amendments, an independent section was proposed by the legislature. No reason has been urged why this may not be done except that it would permit the legislature, by subterfuge, to evade the provision that the general assembly shall have no power to propose amendments to more than six articles at the same session. The members of the legislature are not lawbreakers, and we do not think that the constitution is to be construed on the assumption that the legislature will seek to evade its limitations. An evasion by subterfuge is a

deliberate violation of the constitution, and is impossible with officers who have taken an oath to support it.

We think, therefore, that the legislature may propose a new article to be submitted as an amendment to the constitution.

³⁰⁵ It is next contended that the amendment itself amends more than six articles of the constitution, and is therefore void because in violation of section 2, article 19 of the constitution as amended, which provides that the legislature shall have no power to submit amendments to more than six articles of the constitution at any one session. We are of opinion that this position of counsel is untenable. But one amendment to the constitution was proposed by this article. It will be conceded that it limits, modifies, or abrogates, within certain territory, provisions contained in different articles of the constitution. The purpose of the amendment is to consolidate the city of Denver and a portion of the county of Arapahoe into a new sort of municipality having the combined powers of city and county governments, and to extend to the other cities of the state the privilege of adopting charters in substantially the same manner as is provided for the adoption of the Denver charter, granting to such cities the same power as to real and personal property and public utilities as is granted to the city and county of Denver. The powers of city and county municipalities being essentially different, in investing this new municipality with the powers of both, it became necessary to modify the provisions of the constitution relative to municipal affairs, by providing new ones applicable to such combined government; but this is not an amendment of those provisions such as, in our judgment, was in contemplation by the framers of the constitution, because the constitutional provisions that are abrogated as to the city and county of Denver remain in force generally throughout the state.

The constitution of Illinois contains the identical language found in our own in reference to the initiative by the general assembly. Both constitutions ³⁰⁶ limit the power of the general assembly in these words: "But the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session." In 1878 an amendment was proposed to the legislative article of the Illinois constitution, and section 31 of article 4 was amended, authorizing the general assembly to provide for the organization of drainage districts, granting to the corporate authorities

thereof the right of eminent domain, and empowering them to construct drains and levees and to keep those already constructed in repair by special assessment upon the property benefited thereby. Pursuant to this authority, the legislature enacted a comprehensive law upon the subject, entitled the drainage law. Our attention is directed to four cases in the supreme court of Illinois in which this law and the amendment authorizing it were under consideration. In the case of *Moore's Exrs. v. Lewis*, 106 Ill. 376, the law was assailed because in conflict with article 9 of the constitution. The court said: "The act under which the proceedings were had was passed under the authority of the amendment to section 31, article 4, and authorized by it, and if sections 1, 9 and 10 of article 9 ever had any bearing upon an assessment of this character, after this amendment became a part of the organic law it would control regardless of the original constitution."

In the case of *Huston v. Clark*, 112 Ill. 344, the law was again assailed upon the ground that it was unconstitutional in that it violated the provisions of article 9. The court said: "The special amendment of the constitution adopted in 1878, so far as it invades the former limitations of the constitution, must prevail, and such limitations are not applicable to the subject of this special amendment."

²⁰⁷ In the case of *Wilson v. Board of Trustees*, 133 Ill. 446, 27 N. E. 203, the law enacted under the authority of the amendment of 1878 was again considered by the court, and it was held that, "before the adoption of section 31 of article 4 of the constitution, drainage districts could not be invested with power to make local improvements by special assessments—only cities, towns and villages could be invested with such power (article 9). Since its adoption, drainage districts, as well as cities, towns, and villages, can make local improvements by special assessments, but not by special taxation of contiguous property. The amendment of section 31 operated as a removal of the previous constitutional restriction upon the power of the legislature and not as a grant of power."

In the case of *Wabash R. R. Co. v. Drainage etc. Dist.*, 194 Ill. 310, 62 N. E. 679, the court, recognizing that there was an apparent conflict between articles 2 and 11. and the amendment to article 4, said: "Section 31 of article 4 of the constitution of 1870, as amended, under which the statute authorizing the appellee district to become incorporated was enacted, is paramount to constitutional limitations incorporated

in the constitution as originally framed, with which it is in conflict: *Houston v. Clark*, 112 Ill. 344. To the extent the amendatory section invades the limitations and safeguards erected by said section 13 of article 2 and section 14 of article 11 of the constitution, for the safety and preservation of private property, the provisions of the amended section must prevail, but in all other respects those limitations and safeguards remained unimpaired and in full force and vigor as part of the organic law of the state."

The constitution of Illinois is the only constitution containing the identical language employed by ³⁹⁸ the framers of ours, and it is altogether probable that this provision was copied from the constitution of Illinois. This amendment to the constitution of Illinois confessedly modifies and limits four articles of the constitution, yet its validity has not been questioned; on the other hand, it has been repeatedly held that the amendment not only changed the section which it expressly amended, but limited and modified other articles of the constitution.

In the case of *In re Speakership*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241, in an opinion by Mr. Justice Elliott, our own supreme court recognized the validity of an amendment to the constitution which by implication modified another article of the constitution. This decision was rendered at a time when our constitution provided that the legislature should have no power to propose amendments to more than one article at the same session. The court says: "It was urged in argument with great force that this court ought not to express any opinion upon the questions presented by the executive, for the reason that it would be an interference with matters pertaining exclusively to the legislative department of the government, and therefore in conflict with article 3 of the constitution, which divides the governmental powers of the state 'into three distinct departments—the legislative, executive and judicial'—and forbids those of one department from exercising 'any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.' . . . It must be admitted that the promulgation of a judicial opinion in response to an ex parte inquiry from the executive department of the government, concerning the affairs of the legislative department, is anomalous and peculiar, and, apparently, at least, inconsistent with the prevalent American system of separating the governmental powers ³⁹⁹ into dis-

tinct departments. But it must be borne in mind that the same instrument which divides the powers of government into distinct departments has been so amended by the voice of the people as to require the supreme court to 'give its opinion upon important questions, upon solemn occasions, when required by the governor, the Senate or the House of Representatives': Art. 6, sec. 3."

We have, then, the opinion of the supreme court of Illinois, the opinion of the legislatures of Illinois and of this state, and the opinion of this court that amendments by implication are permissible in amendments to the constitution, and that the constitutional provision limiting the power of the legislature to the proposal of amendments to one article refers to express amendments, and not to amendments by necessary implication. There is no similar limitation in the constitution of any other state, consequently usage and decision in Illinois since 1848 and in this state since 1876 ought to determine the meaning to be given to the words, "but the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session." There is no constitutional provision in this state or in any other state, controlling, or attempting to control, the implied amendment of different articles or of different sections. In fact, there is no such thing as an implied amendment to the constitution. The constitution is a written instrument, and every amendment to it is express. "Amendment by implication" is merely a phrase in common use, because convenient, to indicate that rule of construction by which a later repugnant provision in a constitution or statute modifies or abrogates an earlier one.

Tested by the rule so earnestly insisted upon by the respondent, that early amendment to the constitution ⁴⁰⁰ of this state relating to the salaries of certain officers is palpably, obtrusively and flagrantly in violation of the provision against amending more than one article at the same session. In article 4 it was then provided that the governor should receive for his services a salary to be established by law, which should not be increased or diminished during his official term. In article 6 it was then provided that the salaries of the judges of the supreme and district courts should be such as might be provided by law. The amendment itself purported to amend article 5, yet it fixed the salaries of these officers, and thereby as clearly modified or abrogated these provisions of articles 4 and 6 as if they had been amended by several

amendments, submitted at different sessions of the legislature. That amendment was proposed and adopted so shortly after the adoption of the constitution that it may be regarded as a contemporaneous construction of the meaning of the limitation. In view of this contemporaneous construction, it appears to us that we must sustain this amendment upon the ground that this provision was intended to prevent the submission of too great a number of proposed amendments by the legislature at one session, rather than to preserve the several articles as complete and independent subjects by limiting the scope of a single proposal.

It is next contended that the proposed amendment contains several subjects and therefore is in fact several amendments, and that the constitution requires that each amendment shall be separately submitted. The constitution does not require the submission of separate subjects. It provides that each amendment shall be separately submitted, and it has been the custom of the legislature to submit each proposal separately. In the first amendment proposed ⁴⁰¹ to the constitution several distinct and separate subjects were submitted for consideration. It was provided that the output of mines should be exempt from taxation for ten years, that certain ditches and canals should be exempt from taxation, that household furniture of the value of two hundred dollars should be exempt from taxation; and it might be argued, as it was argued in this case, that one might be willing to exempt household goods of the value of two hundred dollars from taxation and not be willing to exempt ditches from taxation; that he might be willing to exempt the net output of mines for the period of ten years from taxation, but not willing to exempt ditches from taxation; and that because each subject was not separately submitted, the submission was void. The amendment was submitted in the year 1879, and ratified by the people, and has been recognized as a part of our constitution from that day to this.

In the case of *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, Mr. Justice Elliott, speaking for the court, said: "The power of the general assembly to propose amendments to the constitution is not subject to the provisions of article 5 regulating the introduction and passage of ordinary legislative enactments. A proposed amendment to the constitution need not be restricted like an ordinary legislative bill, to a single subject. The only restriction is, that amendments shall not be

proposed to more than one article of this constitution at the same session."

So that the rule of construction that the act shall embrace but one subject is not applicable to a constitutional amendment. But even if we were to regard this amendment as an act of the legislature, it could still be sustained as against the objection that it embraces more than one subject, and be sustained by the decisions of this court and by the decisions ⁴⁰² of the courts of many of the states of the Union. Section 21 of article 5 of our constitution provides, that "No bill . . . shall be passed containing more than one subject, which shall be clearly expressed in its title." This is the identical language of the constitution of Missouri. The supreme court of the state of Missouri, in the case of *Wolfe v. Bronson*, 115 Mo. 271, 21 S. W. 1125, in construing this section of their constitution, said: "If all the provisions of the bill have a natural relation and connection, then the subject is single, and this, too, though the bill contains many provisions."

And in the case of *Lynch v. Murphy*, 119 Mo. 164, 24 S. W. 774, the court says, construing the same section of the constitution: "The generality of an act is not objectionable so long as it is not used to conceal legislation incongruous in itself or which by no fair intendment can be considered as having a necessary or proper connection with the title. No provision in a statute having natural connection with the subject expressed in it is to be deemed within the constitutional inhibition that no bill shall contain more than one subject."

The constitution of Wisconsin contains a provision (section 1 of article 12) that if more than one amendment be submitted they shall be submitted in such manner that the people may vote for or against such amendments separately. An amendment proposed by the legislature and ratified by the people was attacked upon the ground, among others, that it contained several subjects and propositions, which had not been separately submitted. In passing upon this objection the court said: "This provision can have but two constructions: First, it may be construed as is contended for by the learned counsel who contends that the amendment under controversy was not properly submitted, that every proposition ⁴⁰³ in the shape of an amendment to the constitution, which standing alone changes or abolishes any of its present provisions, or adds any new provision thereto, shall be so drawn that it can be submitted separately and must be so submitted. Such a con-

struction would, we think, be so narrow as to render it practically impossible to amend the constitution; or, if not practically impossible, it would compel the submission of an amendment which, although having but one subject in view, might consist of considerable detail, and each separate provision, though all promotive of the same object and necessary to the perfection and practical usefulness thereof if adopted as a whole, in such form that a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions when adopted. Take the case as presented by the amendment under consideration. The learned counsel admits that the proposition to change from annual to biennial sessions is so intimately connected with the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd. . . . We think amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to institute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. Tested by this rule, the propositions submitted to the electors contained but one amendment. It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from ⁴⁰⁴ annual to biennial sessions of the legislature. It was so spoken of by the legislative bodies which passed it, as well as by the electors who ratified it. To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office as well as in the time of their election, and the same may be said as to the change of the tenure of office of the senators. . . . The direction in the constitution requiring separate amendments to be submitted separately has no efficacy in determining what constitutes an amendment as distinguished from what constitutes two or more amendments; and as the word 'amendment' is clearly susceptible of a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as of the construction

that every proposition which effects a change in the constitution, or adds to or takes from it, is an amendment, the construction which has been uniformly adopted by all the departments of the government* for a series of years is entitled to great weight in settling by judicial decision what construction should be placed upon it. . . . We do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and that they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose": *State v. Timme*, 54 Wis. 318, 11 N. W. 785.

⁴⁰⁵ To the same general effect is *State v. Herriod*, 10 S. Dak. 109, 72 N. W. 93.

We therefore conclude that the disagreement between the journals is a mere clerical mistake, that the same bill in fact passed both Houses, and that the entering by mistake upon the journal of the House of the half dozen words quoted does not violate the provision of the constitution requiring the proposal to be entered in full upon the journals of both houses. That, under the constitution, the legislature may propose an amendment as an original article or as an amendment to an existing article. That the limitation that the legislature may not propose amendments to more than six articles of the constitution at the same session does not apply to constructive amendments, or amendments by implication. That an amendment may embrace more than one subject. That if an amendment embraces more than one subject, said subjects need not be separately submitted if they are germane to the general subject of the amendment, or if they are so connected with or dependent upon the general subject that it might not be desirable that one be adopted and not the other.

That this amendment does relate to a single, definite object or purpose, and that the several matters objected to as not germane thereto do appear to be so connected with or dependent upon that object or purpose that they ought not to have been separately submitted.

We have examined all the questions presented, and have disposed of those we regard as essential to a determination of the case.

We do not hold that in proposing amendments to the con-

stitution, the document itself can be ignored, or that, because the people have ratified it, an amendment proposed in violation of the constitution nevertheless becomes a part of that instrument; but ⁴⁰⁶ hold that in the proposal and submission of this amendment, the constitution has not been violated.

We are not unmindful of the fact that authorities have been cited which support views contrary to many of those herein stated, but when a constitutional provision is fairly susceptible of two interpretations—one which will overthrow the will of the majority as ascertained at a general election, will cast discredit upon amendments that have been long acted upon as part of the constitution, and will convict legislature after legislature of a disregard for the provisions of the constitution; and one which will produce the contrary result—our duty is plain.

Let judgment be entered in favor of the petitioner, in accordance with the prayer of the petition.

CONCURRING OPINION.

GABBERT, J. The sole question presented for determination is, whether or not article 20 is valid, in so far as that proposition has been raised by respondent, or he has presented any bearing upon that question which may affect his rights in the premises. The requisite number of members elected to each House voted to propose it. The notice of its submission to the people for their adoption or rejection, as required by the constitution, was given by publication in full in the session laws of 1901, and in a newspaper in every county for the required length of time before election. In addition, it was indorsed by nearly every political party in the state. On account of its features, it was very fully discussed through the public press. No one has been misled as to its scope and purpose. Every opportunity was afforded the people to become acquainted with its provisions before submission for their action. They have voted in favor of its adoption. In such circumstances, it should be upheld, unless for an objection ⁴⁰⁷ which cannot be overcome, there is no escape from declaring it invalid. On the other hand, if the provisions of the constitution relative to amendments have not been complied with, then the conditions recited cannot save it from being declared invalid.

The constitution is the paramount law of the state, created by the people themselves. They have reserved the right to amend that law, but wisely placed restrictions on the exercise of this power, and prescribed a procedure to be followed in the

proposal and submission of amendments to their fundamental law. They are not above this law, and therefore cannot alter the constitution except through a substantial compliance with its provisions on the subject of amendment. All the objections raised to article 20 possessing any merit involve the single question of whether or not this rule of law has been observed.

The first question to consider is the claim that the amendment was not entered in full on the journal of the House when it was first introduced in the Senate. Before final passage by that body it was amended by striking out certain words, inserting the word "and" after "assessor." It was transmitted to the House in this form, and entered upon the journal of the latter as it read before amendment by the Senate.

However, the House journal clearly shows that this was an error. The House journal does not show that any amendment was offered in the House. Its phraseology, as transmitted from the Senate, is not disputed. The House journal shows that it was introduced in the House as received from the Senate. The journal of the House does not show it was returned to the Senate after passage by the House. The journal of the Senate contains all the amendment as passed by the Senate except the word "and." The omission of this word did not change the meaning of the amendment in the slightest degree. It is ⁴⁰⁸ therefore, from the House journal itself, that the difference between the respective journals of the two bodies in the wording of the amendment in so far as it relates to the words stricken out by the Senate, is due solely to a clerical error in the House journal. What this journal does, in fact, show on the subject must be determined from its contents as a whole, and not from what may appear at any particular place. Tested, it is apparent that the proposed amendment as passed by the House and spread upon its records, with the exception of the immaterial word "and," is identical with that passed by the Senate, and the constitutional provision requiring that a proposal to amend the constitution to be entered in full in the journal of each house, is satisfied.

The next question is, whether the constitution may be amended by the addition of a new article. The power of the general assembly to propose amendments is expressed in article 19 in the broadest possible terms, and it is only necessary to consider the subsequent restrictions imposed on this power and the procedure provided for its exercise in order to settle that question. Neither limitation nor procedure

the proposal of an amendment by way of a new article. Except as limited by the constitution, the authority of the general assembly to submit amendments is plenary. So long as they keep within the limitation imposed and follow the prescribed steps, it is immaterial in what form they submit an amendment to the people for adoption or rejection. Article 20 is, therefore, not invalid because an added one, unless some provision of the constitution relative to its submission has been violated.

The constitution prohibits the general assembly from proposing amendments to more than six articles at any one session, and the next question to consider ⁴⁰⁹ is the character of modification which it was the purpose of the constitution to inhibit by the limitation under consideration. An amendment which modifies an existing provision of the constitution without an intervening cause is a direct change. Through such a change other provisions may be modified. The latter, however, is an incident of the first. If the incidental changes following a direct one affected the power of the legislature to propose amendments, then practically the constitution has in one breath conferred upon them the power to submit amendments, and in the next taken it away. All law must be given that reasonable construction which is capable of practical application. To measure the power of the legislature to propose amendments by both direct and incidental effects would render their authority in the premises practically nugatory, a mere dead letter, and leave us without any rule whereby the validity of an amendment as measured by its effect upon existing articles of the constitution, could ever be determined with any degree of certainty at the time of its proposal. I therefore conclude that mere incidental modifications of the constitution resulting from an amendment do not come within the constitutional limitation relating to the number of amendments which may be proposed by the general assembly at any one session.

That article 20 does affect more than six preceding articles must be conceded, so the next proposition is, Are these changes as pointed out by counsel for respondent, other than incidental? The specific purpose of article 20 is to confer upon the city of Denver and cities of the first and second class the power of self-government with respect to certain governmental matters based upon special constitutional provisions. In this respect it introduces an entirely new feature into the constitution by the addition ⁴¹⁰ of a new and distinct article, having one comprehensive and special object. The several provisions it con-

tains appertain to the main subject which it embraces, and while they do change and modify the organic law so far as the municipalities affected are concerned, these modifications are only the natural results following the new plan of government provided specially for them, through which these changes are effected; hence, they are mere incidents of the main purpose of the amendment, and do not amend the constitution in the sense which it was intended to inhibit by the limitation on the power of amendment through legislative proposal.

The final question is, whether or not more than one amendment is embraced in article 20. Having reached the conclusion that it has but the one general purpose indicated, and that it does not amend any of the preceding articles in the constitutional sense contemplated by article 19, that question is easily answered. Its several provisions with respect to the particular governmental subjects which it covers are each dependent upon the other in order to effect the main purpose, and therefore, do not come within the provision requiring several amendments to be submitted separately. In other words, the whole scope and purpose of the amendment was to provide home rule for certain cities with respect to certain governmental matters local in their nature. This is apparent from the contents of the amendment itself, as well as the provisions designating what should appear upon the official ballot in order to enable the electors to vote for or against its adoption. Its several provisions all relate to this one general object, and are designed to accomplish this one purpose, in so far as they relate to cities designated in the amendment either by name or class; so that as a whole, it constitutes but one amendment, having but ⁴¹¹ one subject and one purpose. What particular subjects, however, relating to governmental affairs are embraced in the amendment is a matter for the convention assembled to form a charter to most carefully consider. It should also be borne in mind that there may be provisions of the constitution other than article 20 which must be observed in the creation of a charter.

As to the other questions discussed by my brother Steele which I have not touched upon, I agree with his conclusion without attempting to discuss them, with the exception of the one affecting the rights of the adjacent towns, which I do not think presents any proposition which respondent can raise in these proceedings.

I concur in the judgment for petitioner.

Mr. Chief Justice Campbell Dissented and placed his dissent upon the grounds that:

"1. The Journals of the two Houses show that the same bill was not voted for by both bodies; 2. The proposal, though called 'an amendment,' contains at least two amendments which should have been separately submitted and voted on; 3. Quære, if the general assembly has the power to submit as an amendment new or additional articles to the constitution; 4. But if it has, article 20 amends more than six articles of the existing constitution in direct contravention of section 2 of article 19."

In relation to the first ground, he said in part that "the bill as passed by the Senate was entered in full on its journal, and as passed by the House a like entry was made. The bill was enrolled and lodged in the office of the Secretary of State. It was published in the Session Laws of 1901, and in the newspapers prior to election as required by section 2 of article 19. The bill as spread on the Senate journal does not correspond to the enrolled or published copy, and materially differs from the bill which the House journal shows was passed by the House. In that portion of section 3 which prolonged the official tenure of certain county officers of the former county of Arapahoe and constituted them as officers of the new city and county of Denver, the five judges of the district court, the county judge and the district attorney of the former county were excluded from the bill which the Senate passed, as its manuscript journal shows. The manuscript House journal and both printed journals show that the bill, as it passed the House, included those officers. That the difference between the two original journals and between these bills as passed by the respective houses is material, appears to me so plain that no argument is necessary to show it. As passed by the House the bill does, and as passed by the Senate it does not, make the district judges, the county judge and the district attorney officers of the new city and county of Denver. How is it possible to say that the two bills are the same?

"That the respective manuscript journals on file with the Secretary of State, as prepared by the officers of the general assembly charged with that duty, exhibit this difference is conceded. If we adhere to our previous decisions on this subject, this discrepancy is fatal to the validity of the submission. Section 2 of article 19 declares that the proposal for an amendment must be voted for by two-thirds of all the members elected to each House, and the amendment, as thus passed, must be 'entered in full on their respective journals.' If the Senate passed one bill and the House another, then this amendment as enrolled and published was not voted for by two-thirds of all the members of each House. That the journals of the Houses are the best evidence of what, in fact, those bodies did, and that they are conclusive, has been repeatedly ruled in this state: In *re Roberts*, 5 Colo. 525; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444;

Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Massachusetts Mut. Life Ins. Co. v. Colorado etc. Co., 20 Colo. 1, 5, 36 Pac. 793. . . .

"Moreover, where, as under our constitution, a bill for an act of legislation must be enrolled and filed with the Secretary of State, it is only *prima facie* evidence. If the journals contradict it, the journals control. A fortiori, where an enrolled bill is not required, but where its entry in full on the respective journals must be made, the latter is conclusive in case of conflict. But if we look to the entries of the House journal other than that which discloses the entry of the bill as passed, it is conclusive, to my mind, that the House made some amendments to the Senate bill. That there is no direct statement therein that the House amended the bill, or that House amendments were returned to the Senate for concurrence, is not significant in view of the fact that in proceedings of this sort no such entry is necessary; and if, as indicated in the opinion of my brother Steele, the omission from the record that amendments were made is some evidence that the bill was not amended, though no such record is necessary, then the evidence that the bill was amended by the House is infinitely stronger by the record which was made in the House journal, and which the constitution makes absolutely essential, from which it appears that the bill, as passed, materially differs from the engrossed bill sent over by the Senate. Besides, the House journal shows that the bill was considered in committee of the whole, and when it emerged therefrom and was recommended for final passage, it was, for the first time, referred to as 'S. B. No. 2 (as amended),' and thereafter received the same designation on the House journal. The House also ordered the bill engrossed. If it had not been amended, there was no necessity for that, for the Senate copy was already engrossed. These facts are, to say the least, some evidence of amendment; especially significant is it that before that time the House journal described the bill as 'S. B. No. 2.'

"The authorities of most of the states, including our own, are in accord with my conclusion: Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; Prohibitory Amendment Cases, 24 Kan. 700; State v. Tuffy, 19 Nev. 391, 3 Am. St. Rep. 895, 17 Pac. 835; State v. Brookhart, 113 Iowa, 250, 84 N. W. 1064; State v. Herried, 10 S. Dak. 109, 72 N. W. 93.

"The constitutions of Kansas, California, Iowa and Nevada provide that amendments 'shall be entered on the journals.' They do not say, as ours does, 'in full.' The supreme courts of California and Kansas say that an identifying reference in the journals is a sufficient compliance with this provision, while in Iowa and Nevada amendments must be entered in full: Prohibitory Amendment Cases, 24 Kan. 700; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; State v. Tuffy, 19 Nev. 391, 3 Am. St. Rep. 895, 17 Pac. 835;

Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801.

"That question, however, is beyond discussion in this state, for our constitution declares that the amendments must be 'entered in full on their respective journals,' and all the authorities agree, as shown by the able review in *State v. Herried*, 10 S. Dak. 109, 72 N. W. 93, that the only way to comply with such a provision is to do what the language commands, namely, enter correctly every material word of the amendment. That was not done in this case, if, as relator contends, the House passed the same bill as the Senate. He ought not to be heard to say to the contrary, for the House journal, the best evidence, conclusively proves that, if it did, the entry of the amendment in full was not made. So that whether different bills were passed by the two Houses, or the House failed to make the necessary entry of its doings, in either event the proposal of the amendment was fatally defective.

"To say that the will of the people cannot be thwarted by the error of a journal clerk is an easy, but erroneous, way of evading the mandate of the constitution. Its framers knew that the journals are made up by clerks, and not members. And when the constitution said that amendments should be entered in full on the journals, the members of the assembly should see that the injunction is obeyed. If an error of a clerk is to be an excuse for disregarding mandatory provisions of the constitutions, they might as well be omitted."

Judge Campbell contended that in his judgment the proposed constitutional amendment under discussion contains at least two amendments, that they were not submitted separately as the constitution imperatively requires, and that therefore the submission of such amendment to the people was void. In this connection and referring to *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, he said:

"In the *Nesbit* case it was said that such a submission may, unlike a bill for an act, contain more than one subject. That was so then, and is so now. When the *Nesbit* case was decided there was no constitutional requirement that amendments containing more than one subject must be separately submitted, though that had been the uniform practice. But when this proposal was submitted, amended section 2 of article 19 expressly provided that when more than one amendment was submitted at any election, each of them shall be voted upon separately; and while such a submission may contain more than one subject without rendering it invalid, the true test as to whether they should be separately submitted so as to be separately voted upon is whether it contains one, or more than one, subject.

"The proposal was submitted as one amendment. An elector living in school district No. 1 might want to vote for home rule for Denver, but against consolidating his school district with the out-

lying ones. On the other hand, a resident of the latter might want to vote for joining it to No. 1 so as to get the benefit of the increased values for purposes of taxation, but be strongly opposed to home rule for the city. Yet he must either vote for or against both propositions, though each is an independent subject, wholly disconnected with the other. The scheme of government for each is complete in itself, and the failure to adopt one in no sense interferes with the other that is approved. This illustration shows the reason for the constitutional requirement: *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311.

"Three cases have been cited by both counsel, and, somewhat strangely, each side claims them as authority for its contention. These cases are: *State v. Timme*, 54 Wis. 318, 11 N. W. 785; *State v. Herried*, 10 S. Dak. 109, 72 N. W. 93; *State v. Secretary of State*, 43 La. Ann. 590, 9 South. 776. In the *Timme* case, the court said: 'In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.' In that case the object of the amendment under consideration was a change from annual to biennial sessions of the legislature, and dependent upon this was the proposition to change the tenure of office of members of the assembly from one to two years, and the court held that these were not separate propositions; that to defeat or accomplish the one object both should be defeated, or both adopted, and therefore there was no necessity for submitting them as separate propositions. Yet the test there applied makes this submission clearly invalid; for, as we have seen, this amendment has at least two distinct objects, one to provide a scheme of home rule for Denver, the other to consolidate certain school districts within the same territory, and to furnish for the consolidated district a scheme of government entirely distinct and separate from that provided for the city of Denver.

"In the *Louisiana* case the court held that the sole object of the amendment under consideration was to extend relator's lottery contract for a certain term of years, and that all the provisions and stipulations were merely elements of the consideration which the relator contracted to pay therefor. This case approved the test laid down by the Wisconsin court.

"In the *South Dakota* case the same doctrine was recognized. The case most nearly in point is *State v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652. The proposal there passed upon dealt with the supreme court, the circuit and chancery courts, the method of filling vacancies in the supreme court, and with circuit and chancery districts. The principal object was to change from an appointive to an elective system. Notwithstanding the fact that all these propositions related to the judicial department which were treated

of in the same article of the constitution, the court held that each was a separate proposition, or subject, in itself, and that they should have been separately submitted.

"The case is very instructive and is squarely authority for the conclusion which I have reached upon this branch. It has been criticised by counsel for relator with unpardonable severity. They have not attempted to point out the defective reasoning of the opinion, but content themselves merely with saying that the opinion of a court which passed upon the right of its own members to retain office is not entitled to any consideration. Learned counsel are in error, as a matter of fact, for the amendments in question which were held invalid did not interfere with the tenure of office of the judges of the court who pronounced the decision. It is not necessary for me to defend the integrity or ability of the supreme court of Mississippi. It is now, and has been, a very able court and beyond the breath of suspicion. The published opinion in this case is the best vindication of the ability of its members."

The learned judge then stated that the question whether the general assembly has power to propose an amendment to the constitution by way of an added article is not essential to a decision of this case, yet in his opinion and judgment such action is unauthorized.

In conclusion, Judge Campbell contended that:

"There is no serious denial that, if article 20 is now a part of the constitution, it amends more than six previously existing articles. Indeed, it is easily demonstrable that it radically amends or repeals at least ten, and probably sixteen. It would seem necessarily to follow that it is invalid, because in direct conflict with the inhibition found in the closing sentence of section 2 of article 19 against the proposal of amendments to more than six articles at the same session. . . .

"It is a misuse of the word to say that the inhibitions of section 2 of article 19 are directed only against express or direct amendments, and not against implied or incidental ones. The interdiction contained in the last sentence of that section is against the proposal of something the effect of which may be to accomplish a forbidden result. That thing, if ratified by the people, ripens into an amendment. And if this amendment changes, in any way, expressly or by implication, directly or incidentally, more than six articles, it is absolutely void. This thing called an amendment may, it is true, expressly change, or only incidentally affect, existing articles; but, in the nature of things, it is impossible for the general assembly to propose an implied or incidental amendment. The very meaning of these terms presupposes an amendment expressed in words, or an express or direct amendment of some particular article from which the former is implied or to which the latter is incident. The inhibition goes against the proposal of the 'forbidden amendments,' in whatever way they change existing articles.

"Moreover, the amendments, which cannot change more than six articles, must be entered in full on the journals of the two Houses. How can an implied or incidental amendment be spread upon the records? It is obvious that the thing prohibited is that which the general assembly clothes in language and puts into the form of a bill or resolution.

"The fact that the amendment is by way of an added article does not avoid the limitation. An amendment by addition possesses no virtue not belonging to one directly amending an existing article. Both merely amend something, and both are amendments differently expressed. Complete revision of the constitution may be had by a constitutional convention. Changes less sweeping, and in fewer articles, are brought about by the legislative method of proposal; and it was thought wise not to permit proposals to more than six articles at a time. But the evident intent of the people is thwarted, and there is practically no difference between the constitutional and legislative method of amending the constitution if, by the simple device of adding an article and not mentioning therein existing articles, the limitations of article 19 are to be disregarded. If one article can thus be added, twenty or fifty can be made. This method is unknown to the constitution. Only two methods are prescribed by it. Its recognition here by the court is more than judicial legislation. It is, in effect, the usurpation by the judiciary of the power of making a constitution which is peculiarly a sovereign power of the people themselves. I say this because the court here validates an amendment which never had any life when proposed, and its ratification by the people did not breathe life into it, for it was proposed in direct violation of the limitation which the people themselves had, in the constitution, placed on the legislative initiative. . . .

"To sum up, it may be said that the general assembly has power to submit proposals for amendments to the constitution only such as come within the purview of article 9. If the general assembly proposes any of them, they are subject to the limitations of the grant which confers the power. If it proposes anything by way of an amendment that does not come within the purview of the limitations, it necessarily follows that the thing proposed is beyond the power of the general assembly to submit under any conditions whatever. . . .

"In my judgment the temporary writ should be quashed and the proceedings dismissed, but as the majority of the court think the relief prayed for should be granted, the writ is made permanent."

Where an Amendment to the Constitution, proposed in the legislature, was not entered upon the journal of either House, as required by the constitution of Nevada, such omission was held fatal: State v. Tuffy, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835. As to the

sufficiency of the entry of a proposed constitutional amendment in the journals of the legislature, see *Oakland Pav. Co. v. Tompkins*, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17, and note. A law is not vitiated by a defect in a legislative journal which is shown on the face thereof to be clerical in its nature: *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218.

A *Provision in a State Constitution* will, the same as an ordinary statutory provision, repeal by implication prior legislative or constitutional provisions inconsistent therewith: See the monographic note to *Howard v. Hulbert*, 88 Am. St. Rep. 294.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

YOUNG v. CENTRAL OF GEORGIA RAILWAY COMPANY.

[120 Ga. 25, 47 S. E. 556.]

CARRIER—Mutilated Ticket.—A Railroad Ticket is not mutilated, within the meaning of a stipulation that it shall not be good if mutilated, when no essential part has been removed, as where it is torn in two parts which so fit together as to form an entire ticket and make it indisputable that they are parts of the same ticket when presented in good faith to the conductor. (p. 69.)

CARRIER—Construction of Ticket.—A Stipulation in a special contract embodied in a railroad ticket should be construed most strongly against the carrier. (p. 70.)

Travis & Edwards, for the plaintiff.

Lawton & Cunningham, for the defendant.

25 CANDLER, J. This was an action for damages for the alleged tortious eviction of the plaintiff from the defendant's train. The jury found for the defendant, and the plaintiff excepts to the overruling of her motion for a new trial. It appears that the plaintiff purchased in Augusta, at a greatly reduced price, a ticket over the defendant's line of railroad from Augusta to Savannah and return. This ticket contained a printed stipulation to the effect that if it ²⁶ should become mutilated in any way it should not be good for passage. On the return trip, when the plaintiff tendered the ticket to the conductor, it was torn into two parts. The evidence for the plaintiff was to the effect that she presented both pieces of the ticket, and that they corresponded in such a way, as to the numbering

and other physical characteristics of each, that there could be no doubt that they were parts of the same ticket, and that together they formed the entire return ticket. Witnesses for the defendant, on the other hand, testified that the plaintiff tendered the conductor only a part of the torn ticket. Be that as it may, the conductor demanded the payment of fare by the plaintiff, which was refused, and she was evicted from the train. The court charged the jury as a matter of law that the ticket was mutilated and by its terms invalid, and restricted their consideration of the case to the question whether the plaintiff was evicted from the train at a proper place. This was error. Only by the most narrow and literal construction of the word "mutilated," as contained in the stipulations on the face of the ticket, could the charge be justified. The writer has never favored laxity in the enforcement of agreements between railroad companies and those to whom special rates or gratuities are granted (*Central Ry. Co. v. Glasscock*, 117 Ga. 938, 43 S. E. 981; *Gilleland v. Louisville Ry. Co.*, 119 Ga. 789, 47 S. E. 336; *Holly v. Southern Ry. Co.*, 119 Ga. 767, 47 S. E. 188); but he is equally opposed to a construction so strict as to do violence to the obvious intention of the agreement and work a hardship on the party sought to be bound. The definition given by the Standard Dictionary of the word "mutilate" is as follows: "To cut off or deprive of a limb or essential part of, as an animal body; maim; cut or break off, or otherwise remove any part of, as a statue; disfigure. To retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect as a literary composition; as, to mutilate a speech." The main idea of this definition is the removal of an essential part, so that the whole is rendered imperfect. It is plain that if a ticket has been torn in two, and the two parts, preserved, fit exactly together in such a way as to make it indisputable that they are parts of the same ticket and together form the entire ticket, there has been no mutilation except in a purely physical sense. Nothing essential to a valid ticket has been removed—only its physical symmetry has²⁷ been marred. The only reasonable object to be accomplished by a regulation like the one now under consideration is to prevent fraud. It would, of course, be grossly unfair to the railroad company to require it to honor only a part of a ticket; for in that case two or more persons, only one of whom had paid any consideration to the company, might be enabled to ride on the same ticket. But if the plaintiff's evidence is to be be-

lieved, she furnished to the conductor of the train conclusive evidence that a fraud had not and could not have been perpetrated by her. As to this point there was, as stated before, a conflict in the evidence; but the jury should have been allowed to pass upon the contested issue, and to say whether the plaintiff presented to the conductor in good faith an entire ticket which had, as he claimed, been accidentally torn in two, or only a part of a mutilated ticket.

In the case of *Wightman v. Chicago Ry. Co.*, 73 Wis. 169, 9 Am. St. Rep. 778, 40 N. W. 689, 2 L. R. A. 185, it was held: "A round-trip ticket having the words 'Not good for passage' on the going part of the ticket, and the words 'if detached' on the returning part, is valid when both parts are presented together at the same time, to the same conductor on the going trip, although the parts have become separated by inadvertence." It is contended, however, by counsel for the defendant in error, that this case turned on a special statute, and is therefore not applicable to the case at bar. While it is true that in the opinion reference is had to a Wisconsin statute and it is held that the company is not authorized, "under the guise of regulations, to abridge or impair a passenger's statutory or legal rights," it does not appear that the statute in question related in any way to the question of the mutilated or detachment or tearing of tickets or parts of tickets. On the contrary, it affirmatively appears in the opinion of Cassoday, J., that the statute referred to "required the defendant, upon application 'at its ticket station' . . . and payment of the price, to sell to the plaintiff 'round-trip tickets, good for first-class passengers'" between certain points mentioned. There is certainly nothing in such a statute that would alter the general rule involved or render any the less applicable to the case now under consideration the principles announced in the case cited. Under the rule laid down by this court in the case of *Georgia Ry. Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368, a stipulation in a special contract embodied in a railroad ticket should, ²⁸ in a case of uncertainty, be construed most strongly against the railroad company. In the present case the court gave the most rigid construction possible in the company's favor. The case, we think, was tried on the wrong theory; and we are therefore constrained to send it back for another hearing.

Judgment reversed.

All the justices concur.

A Round-trip Railroad Ticket punctured for the purpose of separation into two parts, and having on the going part the words "not good for passage," on a line with the words "if detached" on the returning part, is good where the parts have become accidentally separated, if they are in good faith both presented to the same conductor on the going trip: *Wightman v. Chicago etc. Ry. Co.*, 73 Wis. 169, 9 Am. St. Rep. 778, 40 N. W. 689, 2 L. R. A. 185. But see *Boston etc. R. R. v. Chipman*, 146 Mass. 107, 4 Am. St. Rep. 293, 14 N. E. 940; *Louisville etc. R. R. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668.

McINTYRE v. McINTYRE.

[120 Ga. 67, 47 S. E. 501.]

NEW TRIAL—Failure of Judge to Exercise Discretion.—When a first application for a new trial is made partly on the ground that the verdict is contrary to the evidence, and the judge overrules the motion without exercising the discretion which the law contemplates he shall, the judgment must be reversed, unless the verdict is demanded by the evidence. (p. 73.)

NEW TRIAL—Overruling Motion for—Exceptions.—When a motion for a new trial is based partly on discretionary grounds, the failure of the judge, in overruling the motion, to exercise his discretion, may be raised by a general exception. (p. 73.)

WILL—Revocation Presumed from Cancellation.—When a will is found among the effects of the testator, with pencil lines drawn through some of its material parts and blank slips pasted over others, it is presumed that he made the cancellations and obliterations, and intended them to operate as a revocation. (p. 74.)

WILL—Revocation Presumed from Pencil Lines.—When a will with lead pencil cancellations is produced, it is presumed that they were made by the testator; and it is upon the party claiming that they were deliberative, and not final, to establish that fact. (p. 74.)

WILL—Revocation.—A Joint Operation of Act and Intention is necessary to revoke a will. (p. 74.)

WILL—Revocation—Intention to Make a New Will.—If the cancellation of a will and the making of a new one were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will is not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way; but if the act of revocation is completed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing. (p. 75.)

WITNESS.—Interest Does not Disqualify a witness in Georgia, since the passage of the evidence act of 1866, but goes merely to his credit. (p. 77.)

Osborne & Lawrence, for the plaintiff in error.

Adams & Adams, for the defendant in error.

⁶⁸ SIMMONS, C. J. A paper alleged to be the last will and testament of Edward McIntyre was propounded for probate. A son of the deceased filed a caveat on the ground that the paper, though once a will, had been revoked by cancellation and obliteration. The finding of the ordinary was in favor of the caveator, and the propounder appealed to the superior court, where a verdict and judgment were rendered setting up the paper offered for probate as the will of the deceased. A motion for a new trial was filed by the caveator, and on the hearing the following order was passed: "In this case it appeared to me at the trial that the evidence inclined against the will, but the jury are the sole and exclusive judges of all questions of fact, and I have no more right to require them to take the facts of the case from the court than they have to require me to take the law from them. Upon this branch of the motion, therefore, I think it would be an usurpation of power to interfere with the verdict upon the ground that the evidence did not authorize it, for the reason that there is sufficient evidence to support the verdict." The order then recited that no error of law was committed and that a new trial would not be granted. The caveator excepted.

1. The application was for a first new trial, and was based partly upon discretionary grounds, that is, that the verdict was contrary to the evidence and decidedly and strongly against the weight of the evidence. The order indicates that the trial judge did not exercise the discretion which the law contemplates he shall exercise in every such case where the evidence is conflicting. The order is very similar in verbiage to that passed in *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912, where a new trial was ordered by this court solely on the ground that the trial judge had not exercised any discretion with reference to the approval or disapproval of the verdict. It is contended that *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912, is not controlling, because in that case there was a special exception raising the point upon which the decision was made, whereas there is no such exception in the present case. We do not think this a valid ⁶⁹ distinction, or that it was necessary to do more than file a general exception to the overruling of the motion. It is to be noted that in neither of the somewhat analogous cases of *Rogers v. State*, 101 Ga. 561, 28 S. E. 978, and *Central Ry. Co. v. Harden*, 113 Ga. 453, 38 S. E. 949, both of which are cited in *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912, was there any special exception. The judgment

must be reversed on this ground, irrespective of others, unless, as contended, the verdict was demanded by the evidence.

2. The paper offered for probate had been duly and legally executed as a will. Some time after its execution the testator drew pencil lines through certain portions of the will, and also caused slips of blank paper to be pasted over certain clauses in the will, through which pencil lines appear to have been previously drawn. The lines were lightly drawn and left the writing perfectly legible. The will purported to have been executed in Effingham county, and a line was drawn through the word Effingham, and the word Chatham written in pencil to the left. The abbreviation "Edwd." in the name of the testator was canceled in the same way and the full name of Edward written above it. The remainder of the formal part of the will was left intact. Pencil lines were then drawn through nine or ten lines making bequests to testator's wife and son, and over some of these lines a blank slip was pasted. The fourteen lines following were unaltered, these describing certain real estate and personal property, and stating that they were given to —, a blank slip being pasted over the name of the beneficiary. On this slip was written, "leave two lines," and diagonally to the right and above the slip was written, "2 blank lines." The clause following was dealt with in the same way, the name of the beneficiary being covered with a slip of paper on which was written, "3 lines." No slip was pasted over the name of the beneficiary of the property described in the next clause, but pencil lines were drawn through it, and the words "2 blank lines" written in pencil to the right. Pencil lines were drawn through the next clause disposing of a share of stock in a corporation to testator's grandson. The following clauses, providing for the payment of debts, making disposition of cemetery lots, nominating testator's wife as executrix, and conferring upon her certain powers, were left intact. The date upon which the will appeared to have been executed was canceled with pencil lines, and the words "two (2) blank lines" written to the left. Pencil lines were also drawn through testator's signature and through the signatures of the witnesses, and the names of three other persons written to the left.

As a general rule, the burden is on a person attacking a paper offered for probate as a will to sustain the grounds of his attack. But by express provision of our statute, where a will has been canceled or obliterated in a material part, a pre-

sumption of revocation arises, and the burden is on the propounder to show that no revocation was intended: Civ. Code, sec. 3343. See, also, *Howard v. Hunter*, 115 Ga. 358, 90 Am. St. Rep. 121, 41 S. E. 638; *Cutler v. Cutler*, 130 N. C. 1, 89 Am. St. Rep. 854, 40 S. E. 689, 57 L. R. A. 209. How far the cancellation or obliteration must extend before this presumption will arise is not settled: See *Malone v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 266. Where the paper is found among the testator's effects, there is also a presumption that he made the cancellations or obliterations: See cases cited in note to *Graham v. Burch*, 28 Am. St. Rep. 351. The presumption that revocation was intended will certainly arise where the testator draws lines through and pastes slips of paper over clauses of the will disposing of portions of his property, and also draws lines through his signature and those of the subscribing witnesses. It having been shown that the paper offered for probate in this case had been in the custody of the deceased up to the time of his death, the propounder was met with both of the presumptions above alluded to.

3, 4. There are cases, chiefly English, holding that a cancellation with a pencil is presumptively deliberative and not final, and no presumption of revocation arises from such cancellations: See 2 *Greenleaf on Evidence*, 16th ed., sec. 681, p. 626, note 12; *Mence v. Mence*, 18 Ves. Jr. 348, and citations in footnote (a). The American cases generally do not adopt this rule: *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269; *Gardner on Wills*, sec. 81, p. 258. Mr. Underhill characterizes the English rule as absurd, and says that "the true rule is that the cancellation of a will in lead pencil is only one fact to be considered in determining the effect of the cancellation and the intention with which it was made. Where a will is produced with lead pencil cancellations, it will be presumed that they were done by the testator *animo revocandi*; and it is upon the party claiming that they were deliberative and not final to establish that fact": 1 *Underhill on Wills*, sec. 230. This statement of the law expresses our views.

⁷¹ 5. Joint operation of act and intention is necessary to revoke a will: *Howard v. Hunter*, 115 Ga. 358, 90 Am. St. Rep. 121, 41 S. E. 638. As aptly and concisely expressed by James, L. J., in *Cheese v. Lovejoy*, 2 P. D. 251-253: "All the destroying in the world without intention will not revoke a will; nor all the intention in the world without destroying; there must

be the two." Here we have certainly the act, and an act of such a character as to give rise to a presumption of intention to revoke. It is contended that the evidence demanded a finding that this presumption had been rebutted; but this contention as we shall presently show, cannot be sustained.

6, 7. Reference is made in the brief of counsel for the defendant in error to what is known as the doctrine of "dependent relative revocation." Under the operation of this doctrine it has been held that if a testator cancel or destroy a will, with a present intention to make a new will as a substitute for the old, and the new will is not made, or if made fails of effect for some reason, it will be presumed that the testator preferred the old will to an intestacy, and this testament will be given effect. We believe this doctrine to be sound, when properly understood and properly qualified. It is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Some of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive. The doctrine, as we understand it and are willing to apply it, is thus: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked—if the act of revocation is complete—as if the will be totally destroyed by burning and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make ⁷² a new will, or made one which cannot take effect, counts for nothing. In other words, evidence that the testator intended to make, or did actually make, a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked: See, on the subject, Page on Wills, sec. 276; Schouler on Wills, 3d ed., sec. 398; Pritchard on Wills, sec. 272; 1 Woerner's American Law of Administration, 2d ed., sec. 48, pp. *90, 91; Semmes v.

Semmes, 7 Har. & J. (Md.) 388; Banks v. Banks, 65 Mo. 432; Hairston v. Hairston, 30 Miss. 276; Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363; Gardner v. Gardner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; Will of Penniman, 20 Minn. 245, 18 Am. Rep. 375; Johnson v. Brailsford, 2 Nott & McC. (S. C.) 272, 10 Am. Dec. 601; In re Olmsted's Estate, 122 Cal. 224, 54 Pac. 745, 747; Thomas v. Thomas, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104; Townshend v. Howard, 86 Me. 285, 29 Atl. 1077; notes to Graham v. Burch, 28 Am. St. Rep. 345. Applying what has been said to the facts of the present case, the following result is reached: There was evidence from which the jury could have found that when the testator canceled the old will he intended to make a new one. The canceled paper itself bore evidence of such an intention. If this was his intention, and he did not intend for the cancellation to operate as a revocation unless the new will was made, then the finding ought to be in favor of the propounder. On the other hand, there was evidence from which a jury could find that the cancellation was intended to operate as a revocation; and if this is the truth, the finding ought to be against the will, notwithstanding it may appear that the testator contemplated the making of another will. These are questions for the jury to decide. The matter finally turns upon the intention of the testator, and no mere presumption can be allowed to defeat this intention when it has been made to appear.

8. The evidence did not demand the verdict rendered. A witness for the caveator testified that he was present in the room during the last illness of the deceased, and that he said to his son, the caveator, "Willie, I have left a pencil memorandum of a will—it is not a will—I was not able to finish [or complete] it; but I call upon Willie to carry out the provisions of this pencil memorandum." The witness testified positively and unequivocally that this was the exact language of the deceased. Where the issue is *revocavit vel non*, the declarations of the testator are, in this ⁷³ state, admissible, "although made at any time between the making of the will and the death of the testator": Patterson v. Hickey, 32 Ga. 156. The reply made by the propounder to this evidence is, that, while admissible, it is of slight evidentiary value, and counts for nothing when weighed against the other evidence that the testator did not intend a revocation; and that, properly construed, the declaration itself really shows that the testator regarded the paper as his will. We have been unable to take this view of the matter.

The evidence is of an explicit declaration by the testator that the paper was not his will, but contained only memoranda for a will. The request to the son was to carry out the provisions of memoranda and not of a will. If not his will, it must have been revoked, for it was once a will. The preponderance of the evidence may have been to the effect that the testator did not intend a revocation, but it cannot be said that there was no evidence to the contrary. We send the case back that it may be retried in accordance with the views herein expressed. The motion for a new trial contains several grounds, but most of them are covered in the foregoing discussion. One ground complains that the court allowed Mrs. McIntyre, widow of the deceased, and propounder of the will, to testify, the objection being that she was "interested in the result of the suit." Since the passage of the evidence act of 1866 and its amendments, interest does not disqualify a witness, but goes merely to his credit. Error is not assigned upon any portion of the testimony of Mrs. McIntyre, nor is it contended that she is disqualified as a witness under any of the provisions of the act of 1889 (Civ. Code, sec. 5269), the sole objection being that she is interested. As to her competency to testify to transactions and communications between herself and the deceased, see *Buchanan v. Buchanan*, 103 Ga. 90 (1), 29 S. E. 608. The charge of the judge was, in the main, fair and accurate. The instruction on the subject of the burden of proof was, however, not altogether accurate.

Judgment reversed.

All the justices concur.

The Revocation of a Will consists of two things: the intention of the testator and some outward act or symbol of destruction: *Cutter v. Cutter*, 130 N. C. 1, 89 Am. St. Rep. 854, 40 S. E. 689, 57 L. R. A. 209. See, too, *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 South. 98; *Howard v. Hunter*, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638; *In re Knapen's Will*, 75 Vt. 146, 98 Am. St. Rep. 808, 53 Atl. 1003. The finding of a will in the testator's desk with his signature canceled raises the presumption that the cancellation was done by him with the intention of revoking it: *Matter of Hopkins*, 172 N. Y. 360, 92 Am. St. Rep. 746, 65 N. E. 173; and see the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 351, on the revocation of wills. Where a portion of a will is canceled or erased by the testator with a view to a new disposition of the property, and the proposed disposition fails to be carried into effect, the presumption in favor of a revocation is repelled: *Thomas v. Thomas*, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104. And see, as to the effect of a cancellation of a will with intent to make a new one, the note to *Giddings v. Giddings*, 48 Am. St. Rep. 199, 200. As to the effect of cancellations in lead pencil, see *Estate of Tomlinson*, 183 Pa. St. 245, 19 Am. St. Rep. 637, 19 Atl. 482.

TABB v. MALLETTE.

[120 Ga. 97, 47 S. E. 587.]

EXEMPTION OF WAGES of Quasi Municipal Employé.—Where a watchman is employed, paid, and subject to discharge by a railway company, the fact that the city clothes him with power to make arrests and places him under the superintendence of the police department, does not make him a municipal employé whose wages are exempt from garnishment. (p. 80.)

EXEMPTION—Watchman not a Laborer.—A watchman employed by a railway company to guard and protect its property, and authorized by the city to make arrests, is not a laborer within the meaning of exemption laws, for the discharge of these functions requires the exercise of the intellectual faculties rather than manual labor. (p. 81.)

P. J. O'Connor and John E. Schwarz, for the plaintiff in error.

D. H. Clark, for the defendant in error.

98 EVANS, J. Mrs. A. R. Mallette sued E. C. Tabb in a justice's court, and, upon filing her affidavit and bond, caused a summons of garnishment to be issued and served on the Central of Georgia Railway Company. The garnishee answered that it was indebted to the defendant in a named sum, which was due to him for his monthly wages as a laborer, and that such wages were exempt from the process and liabilities of garnishment. The defendant also filed his answer, claiming that all money owing him by the garnishee had been earned by him as a day laborer while in its employment. The issues formed on the answers were tried in the justice's court, and an appeal was taken to the superior court. On the trial of the appeal the evidence was as follows: The paymaster of the garnishee company testified: The defendant, E. C. Tabb, "was employed by the Central Railway Company as a policeman. He is paid at the rate of sixty dollars per month. It is part of his duties to check off the number of bales of cotton or boxes of merchandise as they pass over the railroad bridge on the trucks, and to see that the number of bales and boxes correspond to the amount called for on the ticket held by the driver. In any case where there is a dispute he turns the truck back. Tabb has nothing to do with the marks of the shipper on the cotton and boxes. He only counts the number of packages on the trucks and sees that they correspond to the number on the ticket. In case of a question arising, I think the sergeant would settle the dispute.

Tabb receives all orders from the sergeant, such as the limits of his beat and the lengths of his tours of duty. He is not allowed to sit down at any time while on duty, but must walk his beat continually. If he loses a day and has no good excuse, he is docked for same. I don't know of any mental work he does, except checking packages. Tabb is general custodian of the company's property. He is hired, paid, and discharged by the company." Another witness, the superintendent of police for the city of Savannah, testified: "The Ocean Steamship force is, to a certain extent, under my control. When a man joins the police force, he is given a copy of the rules by which he is to be governed, and is supposed to acquaint himself with them as soon as possible. The men are never examined, so far as I know, as to their knowledge of the rules. When one of the rules is violated, the mayor has charge of the matter. Tabb is subject to the same rules as govern city policemen and subject to the commands of the officers of the city police. All policemen are required to read and write English understandingly. Tabb is really not employed by the city, although subject to the same rules that govern the city police. He is employed, paid, and discharged by the Central of Georgia Railway Company."

The defendant Tabb, as a witness in his own behalf, testified: "I am a policeman on the Ocean Steamship Company's wharf, and have been for four years. Before joining the police force I had to pass a physical examination. My tours of duty run from seven to ten hours; seven in the day and ten at night. During my tours of duty I am continually walking; am not allowed to sit down or rest, and am exposed to all kinds and conditions of weather. I am not allowed to hold conversation with anyone, except in the discharge of my duties. I receive all instructions from the sergeant. In any case of dispute, the matter is always left to the sergeant for settlement. In the absence of the regular bridgeman, I check the number of packages on the trucks or drays that pass over the bridge. I only count the number of packages. I also catch the line from incoming ships; and in case of bad weather, I help move the boxes of merchandise on the wharf to places of safety. I am paid at the rate of sixty dollars per month and am docked for loss of time. I was not required to pass mental examination. No rule-book was ever given me. . . . I make no written reports whatever. I have nothing whatever to do with the marks on cotton. . . . The limits of my beat are not always the

same. We are changed about. The sergeant directs us what to do. If I am in doubt about my right to arrest a person, I send for the sergeant. If it is a plain case, I send the person to the barracks. There is a regular man to check packages at the bridge and to catch lines from the ships; but in case of his absence, I am required to do his work. It is a part of my duty. It is also part ¹⁰⁰ of my duty to move packages to places of safety during rain. I am in uniform during my tour of duty, and carry a pistol and club. During the absence of the sergeant, I make the arrest if it becomes necessary to make an arrest. I send for the sergeant; and if he cannot be found, I determine myself whether or not to arrest the party. I only help to remove freight to places of safety during rain. There are men employed for such purposes as this, but it is a part of my duty to help them in case of rain."

The plaintiff introduced in evidence certain provisions of the code of Savannah, declaring that the watchmen employed by the railway company should be under the supervision of the officers of the police department and under a duty to observe the rules therein set forth, by which the policemen of the city were governed. Upon the conclusion of the evidence the court directed a verdict for the plaintiff, finding the fund in the hands of the garnishee subject to process of garnishment. Error is assigned on the direction of the verdict.

1. There can be no question about the salary of an officer of a municipality being exempt from the process of garnishment: *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Holt v. Experience*, 26 Ga. 113; *Leake v. Lacey*, 95 Ga. 747, 51 Am. St. Rep. 112, 22 S. E. 655. The reason for this exemption is founded on principles of sound public policy. In the case reported in 54 Georgia, Judge McCay said: "The exemption is not for the benefit of the officer, but because the public is not to be harassed and inconvenienced by petty suits in the shape of garnishments and the efficiency of its servants interfered with by any uncertainty whether when the salary is due it will be paid." Where a private corporation employs, pays and discharges its own employé, the fact that the city clothes such employé with the power to arrest violators of municipal ordinances and places him under the superintendence of its police department will not make him an employé of the city. The city owes him nothing for his service; his compensation is paid by the employing corporation, and his wages are in no sense payable out of the city's funds. Unless his wages are otherwise exempt, they can be reached by garnishment of the employer.

2. There is usually more or less difficulty in applying an abstract principle of law to a given statement of facts. This is illustrated in the present case, where attorneys for both plaintiff ¹⁰¹ and defendant in error cite the same case (*Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403) in support of their respective contentions as to the definition of the word "laborer" as used in our garnishment statute. The character of the service rendered by the plaintiff in error is undisputed; he contends that the evidence shows that his service was mainly work of a physical nature; and the defendant in error insists that the only reasonable deduction from the evidence is that the service rendered under the contract of employment contemplated mainly work requiring mental skill and business capacity. The test of determining whether a particular individual performing certain services is a "laborer" is very carefully and accurately given by Judge Lumpkin in the case of *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403, and I have taken the liberty of using an extract from it in formulating the syllabus for this opinion. Applying this test to the present case, the plaintiff in error was not a "laborer" in the sense in which this word is used in the Civil Code, section 4732. His employment called upon him to decide when a municipal ordinance had been infringed, and what course to pursue with regard to arresting the offender; what to do with him when arrested; whenever the emergency arose, he was to preserve order; and at all times he supervised the safety and security of his employer's property. To discharge these functions would require the exercise of the intellectual faculties. Very little manual labor was performed by him, but most of his work was of a supervisory nature demanding the exercise of mental skill and business capacity.

3. There being no conflict in the evidence, and all reasonable deductions or inferences therefrom demanding the verdict, the judgment is affirmed.

All the justices concur.

EXEMPTION OF WAGES, SALARIES AND EARNINGS.

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Scope of Note.

Inasmuch as the exemption of wages and earnings is dependent in most instances upon whether the claimant for the exemption performs the character of labor which brings him within the meaning of the term employed by the statute in describing the class of laborers whose wages or earnings are made exempt, and inasmuch as often the right to the exemption is made dependent upon whether the compensation sought to be exempted belongs to the class of compensation exempted by the statute, we shall in this note consider the subject principally from the standpoint whether the claimant for exemption belongs to the class of laborers or employés whose compensation is exempted by the statute, and whether the compensation received by the claimant is of that class of compensation intended by the statute to be exempt. The general subject, as well as various phases of it, has been considered several times before in this series as well as that of the American Decisions. Thus the exemption of earnings or wages from execution or attachment was the subject of a monographic note to the case of *Brown v. Hebard*, 91 Am. Dec. 411; the question who are laborers within the meaning of exemption and mechanic lien laws was treated exhaustively in the note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 303, while the exemption of salaries of public officers from attachment, execution or other similar process was the subject of the monographic note attached to *Dickinson v. Johnson*, 96 Am. St. Rep. 443. The extraterritorial effect of exemption laws was treated in the notes to

Mumper v. Wilson, 2 Am. St. Rep. 240, and Missouri etc. Ry. v. Sharitt, 19 Am. St. Rep. 145, while the exemption of the proceeds of exempt property was treated in the note to Cullen v. Harris, 66 Am. St. Rep. 381.

I. Varied Phraseology of Statutes Exempting Wages, Salaries and Earnings.

The statutes of the various states exempting wages, salaries and earnings are very far from uniform in their provisions respecting such exemptions. The varied phraseology of such statutes was remarked upon in Freeman on Executions, section 234, where in entering upon the discussion of the general subject of such exemptions, it was said: "In most of the states the exemption laws have been amended at a comparatively recent period with a view of exempting some portion of the earnings of persons who do not carry on business on their own account, but merely as employés of others. The rapid multiplication of great manufacturing, transportation, and other corporations, with the army of employés in the service of each, has attracted attention to the multitude of men, many of whom are householders, who have no tools or implements of their own to be exempted, and whose only means of support consists of the moneys due them from their employers at stated times for services rendered. The garnishment of these moneys left them and their families without any means of support. Hence the enactment of divers statutes withdrawing such moneys, to a limited extent, from execution and attachment. The debt thus withdrawn is variously described as 'wages, salaries or compensation of laborers and employés for personal services'; 'time wages of all laborers and mechanics'; seamen and sea-going fishermen's wages, and earnings of the judgment debtor for his personal services; wages or earnings; 'earnings of judgment debtor for his personal services,' including wages due for the personal services of any minor child; 'debt which has accrued by means of personal services of the debtor,' and the entire amount of wages for the labor or services of any married woman or minor; 'fifty per cent of the wages for labor or services of any person residing within the state'; 'money due for personal labor or services'; 'daily, weekly, or monthly wages of all journeymen, mechanics, and day laborers'; 'wages and services'; 'wages'; 'earnings of a judgment debtor for his personal services or those of his family'; 'wages or hire due to any laborer or employé'; 'salary of an officer or wages or recompense for personal services of the debtor'; 'money or credits which are due for the wages of the personal labor or services of defendant, or of his wife or minor children,' and also the wages or pay due or accruing to any seaman; wages of any person or of the minor children of any person; 'wages of every laborer or person working for wages'; 'wages of laborers, mechanics, and clerks'; 'personal earnings of the debtor'; 'wages of any laborer, or the

salary of any person in private or public employment'; 'salary or wages of a debtor and his wife and minor children'; 'wages of mechanic or other laboring man'; 'current wages for personal services'; 'wages or compensation'; 'one-half of the earnings of the judgment debtor for his personal services, and all the earnings of any minor child of any debtor'; 'earnings of all married persons having families dependent upon them for support'; 'current wages or salaries,' and 'earnings not exceeding one hundred dollars for each month of all residents who are married or who have to provide for a family.' "

"The amount of wages or earnings exempted varies in the different states. In some it must not exceed twenty-five dollars per month; in others it is for a designated number of days preceding the garnishment; in others, the time is not limited. In some of the states a necessity for the exemption must be shown; while in others it need not. It will be observed that these statutes, while addressed to the accomplishment of substantially the same objects, vary in their phraseology. The exemption in some of them is said to be of wages; in others of earnings, and in still others of salary. In some the persons to whom the exemption applies are described as laborers, clerks, mechanics, etc. Where there is nothing to indicate the persons entitled to the exemption other than what is implied from the use of the words 'wages,' 'earnings' or 'salary,' it is necessary to consider the meaning of these words, for a debt may be due the defendant in execution for something done by him, and yet such debt may not represent either wages, salary, or earnings, as these terms are employed in these statutes; and where the exemption is limited to mechanics or laboring men, it may be necessary to ascertain whether the claimant is either. Where the defendant is working for a salary or where the money or debt sought to be subjected to execution is the result of the defendant's personal labor, unassisted by any other person or thing, there can be no doubt that he is entitled to the exemption, unless such exemption is conceded only to a particular class of persons to which the claimant does not belong. Thus, if the exemption is of earnings of the debtor for his personal services, a professional man, as a physician or school teacher, is entitled to the exemption. If, on the other hand, the exemption is given to laborers or mechanics, the claimant must show that he belongs to the class exempted. Whether a claimant is a laborer or mechanic may frequently admit of doubt."

II. Exemption as Dependent upon Nature or Class of the Employment.

a. **Definitions.**—It would be difficult, if not impracticable, to give any general definition of the words "laborer" or "laboring man," which would at once include all the cases falling within the words and exclude those falling without. It may, however, be safely said that the word "laborer," when used in its ordinary and usual ac-

ception, carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers: *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953, 21 S. E. 817. It was said in *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, 43 N. W. 794, 6 L. R. A. 338, that "all men who earn compensation by labor or work of any kind, whether of the head or hands, including judges, lawyers, bankers, merchants, officers of corporations, and the like, are in some sense 'laboring men.' But they are not 'laboring men' in the popular sense of the term, when used to refer to a man's employment, and that is the sense in which we must presume the legislature used the term." So, also, in *Wakefield v. Fargo*, 90 N. Y. 213, the court, in construing an act making stockholders in a corporation liable for debts due "laborers, servants and apprentices" for services performed for the corporation, held that a "laborer" is one who performs menial or manual services and usually looks to the reward of a day's labor or services for immediate or present support. And in *Weymouth v. Sanborn*, 43 N. H. 173, 80 Am. Dec. 144, it was held that "laborer" is a term ordinarily employed to denote one who subsists by physical toil in contradistinction to those who subsist by professional skill. And in *Consolidated Tank Line Co. v. Hunt*, 83 Iowa, 6, 32 Am. St. Rep. 285, 43 N. W. 1057, 12 L. R. A. 476, it was stated that "laborers" are those persons who earn a livelihood by their own manual labor. In *Gurney v. Atlantic etc. Ry. Co.*, 58 N. Y. 358, the court construed the word "employé," used in an order of the court in a receivership proceeding, to be a word of more comprehensive signification than laborers and operatives. In *Hoyt v. White*, 46 N. H. 48, the court, in construing the term "personal services or earnings" as applied to the wife in connection with trustee process, said: "Something more is evidently intended here by the term 'services and earnings' as applied to the wife, than by the term 'labor' as applied to any of the debtor's family. It is said in *Weymouth v. Sanborn*, 43 N. H. 173, 80 Am. Dec. 144, that claims for labor would not ordinarily be understood to embrace the service of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad or other contractor, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill. But not so with the personal services and earnings of the wife. Her earnings may be as well for works of skill and science as for mere physical toil. Suppose the wife to be a practicing physician; her services and earnings cannot be reached by trustee process. Is she an artist? Her services and earnings are exempt. Is she a musician, the most skillful performer at the opera, or the most gifted singer at the concert? It might

not be her labor, but would be her services. In fact, we ordinarily speak of the services of the physician and lawyer with particular reference to their skill, rather than the amount of physical toil they perform. We procure the services of engineers, architects, sculptors, painters, stage players, master builders, etc. The earnings of a person generally depend more on the degree of skill than the amount of physical toil. To the conducting and managing of trade of hotels, of factories, of machine-shops, and of boarding-house men devote their own services, or employ others to do so, and the wife, while engaged in trade or in keeping boarders, is simply in the service of the husband—is earning money for him by these services."

A more strict construction of the word "laborer" seems to be used when employed in a statute giving a lien to laborers upon the property of their employer or when creating a liability against the stockholders of a corporation for claims of its laborers: *Ricks v. Redwine*, 73 Ga. 273; *Hinton v. Goode*, 73 Ga. 233; *Gurney v. Atlantic etc. Ry. Co.*, 58 N. Y. 358.

b. **Employments Involving Mainly Manual Labor.**—Where a contract of employment contemplates work, the doing of which depends mainly upon the mere physical power of the employé to do ordinary manual labor, the person so employed is a "laborer" within the meaning of a statute exempting from garnishment the wages of journeymen, mechanics and day-laborers, even though such person has control and management of coemployés engaged in similar work: *Stothart v. Melton*, 117 Ga. 460, 43 S. E. 801. In *State v. Land*, 108 La. 512, 32 South. 433, 58 L. R. A. 407, the court, in holding that a mechanical engineer running a passenger train was not a laborer, gave the reason for the existence of statutes exempting "laborers" in the following language: "It has been said that such and similar statutes are presumably intended to protect a class of men who are ill-fitted to protect themselves, men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families, and that they should not be extended by forced construction so as to include a class of men who are competent to take care of themselves and need no such protection. 'Muzzle not the ox which treadeth,' denotes a subdivision in the great army of industry which does not include the energetic self-reliant mechanic of this country." Very often the absence of any especial skill or training is an important element in determining whether a person engaged in a particular employment is a laborer or not. Thus, in *Krebs v. Nicholson*, 118 Iowa, 134, 96 Am. St. Rep. 370, 91 N. W. 923, the court, in holding that one whose only occupation was in having the entire care of a stallion moved from stand to stand for breeding purposes was a laborer within the meaning of an exemptory statute, said: "A laborer is defined to be one who is 'engaged in some toilsome physical occupation; one who performs work which

requires little skill or special training': 4 Century Dictionary, 3318. While it cannot be said, as a matter of law, that the plaintiff's occupation was of the most toilsome nature, it still requires some physical effort, and but little skill or special training, as we understand it; and, if by this labor he earned his living, he was a laborer within the meaning of the statute." So, also, in *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, 43 N. W. 794, 6 L. R. A. 338, it was held that an agent who sells goods by sample was not within the meaning of a statute exempting certain wages of "a laboring man or woman" from seizure, the court saying that the statute refers only to those whose work is manual. And going along the same line, the court in *Mann v. Burt*, 35 Kan. 10, 10 Pac. 95, held that a teamster employed by a contractor was a laborer. The proposition that employments involving mainly manual labor constitute the employé a "laborer" within exemption statutes hardly admits of any controversy, but it is always a question whether any particular employment comes within the rule.

c. **Employments Involving Mainly Skill or Intellect.**—It may be stated as a general rule that if the contract of employment contemplates that the services to be rendered are to consist mainly of work requiring mental skill or business capacity and involving the exercise of the employé's intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, the employé would not be a "laborer" within the meaning of statutes exempting the wages of "laborers": *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403; *Kline v. Russell*, 113 Ga. 1085, 39 S. E. 477. So, also, in *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392, 32 South. 433, 58 L. R. A. 407, the court stated that clerks, agents, cashiers of banks, and all that class of employés whose employment is associated with mental labor and skill are not considered laborers within the meaning of such exemptory statutes. And in applying the rule to the case at bar it held that a locomotive engineer was not a "laborer." In making its ruling the court said: "The statute exempts 'laborers' wages,' a term of very broad meaning, it is true, but it remains that the skilled mechanic thoroughly versed in all the details and intricacies of his art is not to be compared with a laborer who hires himself out to serve on plantations or to work and toil in manufactories as a mere servant, subject, without question, to the will and direction of the master. The former is frequently consulted in matters of the utmost importance and his suggestions nearly always considered and heeded." So, also, in *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144, the court drew the distinction between the class of services where physical toil was the main ingredient and services where the main ingredient was professional or other skill, and accordingly held that the professional services of a physician was not labor within the meaning of such

statutes. The court also adverted to the reasons for the distinction, and in that connection called attention that the object of such ex-emptory statutes was to protect a class of employes whose means of support for themselves and families would be likely to depend upon the punctual payment of their wages making their claim for an exemption even more urgent and necessary than the homestead exemption which is ordinarily allowed to those who are fortunate enough to own property of such a nature. In *Whitecomb v. Reid*, 31 Miss. 587, 66 Am. Dec. 579, the court held that a dentist was not a "mechanic" within the meaning of a statute which exempted from execution the "tools of a mechanic necessary for carrying on his trade." It was urged that because the practice of the art of dentistry involved the manual use and operation of instruments that such fact brought him within the term "mechanic," but the court answered that argument by the fact that the practice of his art required a knowledge of the physiology of the teeth which could be acquired only by a proper course of study of learned treatises on the subject, and that it was an art which required both science and skill. In *South etc. R. Co. v. Falkner*, 49 Ala. 115, it was held that the salary of the president of a railway was not exempt as wages of a laborer or employe. In *Ensel v. Adler*, 110 Ga. 326, 35 S. E. 334, a general salesman in a clothing-house was held not to be a laborer within the terms of an act exempting the wages of all laborers from the process of garnishment. And it was held in an earlier case in Georgia that a commercial traveler who sells goods was not a day-laborer within the meaning of a statute exempting the wages of day-laborers, even though he was employed and paid by the day: *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192, 20 S. E. 40. And in *Epps v. Epps*, 17 Ill. App. 196, it was held that a traveling salesman was not entitled to an exemption given by a statute which applied to "laborers or servants." In *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, 43 N. W. 794, 6 L. R. A. 338, it was held that an agent selling goods by sample, who drove about for that purpose with his own horse and buggy, receiving a weekly salary, was not within the terms of statute which exempted "the wages of any laboring man or woman" up to a certain amount. See, also, *Jones v. Avery*, 50 Mich. 326, 15 N. W. 494, to the same effect. In *State v. Cobb*, 72 Tenn. (4 Lea) 481, it was held that costs due a commissioner in a proceeding in the county court for the partition of land, for his services as such commissioner were not exempt under a statute exempting "the wages of mechanics or other laboring men."

d. Employments Combining Intellectual and Manual Labor.

1. In General.—Many occupations and employments partake of a combination of manual labor aided by such a degree of skill or use of the intellect that it is difficult to determine whether the person doing the work belongs to the class of workmen whose wages are

exempted by the statute. "Courts may agree upon the general definition or description of a laborer and yet differ as to whether a particular person is entitled to exemption, because of his occupation. Every character of work for compensation or for any other purpose, except that of pleasure, may without impropriety be called labor, and the doer of it a laborer; but to give the latter word so comprehensive a signification in the statutes of exemption would be to deprive it of any meaning, or, more accurately speaking, to include within it all persons to whom any wages, earnings or salary may be due. So it may appear that part of what the claimant is entitled to compensation for would, if standing alone, be properly regarded as the work of a laborer and the balance not, and then it is obvious, as the court cannot segregate his services and adjudge what part of the sum due him is due to him as a laborer and what part in some other capacity, it must consider his employment as a whole, and determine whether it is chiefly that of a laborer or not. Thus, where the questions involved were whether a clerk in a store and a civil engineer were entitled to exemption as laborers, and it appeared that each discharged some duties requiring manual labor, but both were employed because they possessed and exercised some skill superior to that of an ordinary laborer, it was held that neither was entitled to the exemption because in the main his services were 'not such as depended upon physical power to do ordinary manual labor, but consisted principally of work requiring mental skill or business capacity and involving the exercise of his intellectual faculties'": Freeman on Executions, sec. 234. In *Stuart v. Poole*, 112 Ga. 818, 81 Am. St. Rep. 81, 38 S. E. 41, the issue was whether a street-car conductor was a "laborer" within the meaning of the statute exempting wages of such a "laborer" from the process of garnishment. It was agreed that his duties were to keep the car in general order; to couple and uncouple trail-cars when used; to keep lights dusted off and in proper condition; to keep the guard-rails of the car in proper position; to attend to the trolley and keep it in place; to keep the seats of the car turned; to help passengers on and off the car; to help put the car back on the track if it gets off, and to help remove all obstructions from the track; to change switches when there are switches but not to open or close frogs; to get off and flag every railroad crossing; to look out for accidents at the rear of the car, and although it was agreed that the conductor and motorman have joint charge of the car, it was agreed that the conductor gives the orders for starting and stopping except that the motorman stopped the car at the instance of hailing passengers; that the conductor collects the fares and issues the transfers, and that both the conductor and motorman must see that the car is run on schedule time. The court from this statement of the duties of the conductor held that he was a "laborer." After adverting to the case of *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep.

300, 25 S. E. 403, and approving the general principles laid down therein, the court added as a reason for its holding that: "Every occupation, however menial, involves the exercise of some degree of sense or judgment; and every calling, however exalted, carries with it the performance of work which partakes more or less of the nature of drudgery." The court also laid stress upon the fact that a greater part of the conductor's time was spent in physical labor than was spent in the exercise of his intellectual faculties. It was also held in *Day v. Highland Street Ry.*, 135 Mass. 113, 46 Am. Rep. 449, and *Frutchey v. Lutz*, 167 Pa. St. 337, 31 Atl. 638, that street-car conductors were laborers. The rule, however, seems to be different in regard to conductors on steam railroads: See *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90. In *Boyle v. Vanderhoof*, 45 Minn. 31, 47 N. W. 396, the wages of a telegraph operator were held exempt. In that case, however, the decision was based more upon a construction of the words of the statute in connection with its title. The act was entitled "An act to fix the amount of wages of laborers exempt from process of attachments, garnishments, or execution," while the act itself provides "that the wages of any person or the minor children of any person" should be exempt to a certain amount. The court held that from the whole act it was intended to apply to employes other than workmen engaged in manual labor. In *Sanner v. Shivers*, 76 Ga. 335, the court held that a locomotive engineer was entitled to the exemption allowed by a statute to "all journeymen, mechanics, and day-laborers." The court said: "We are of the opinion that a locomotive engineer is a day-laborer engaged in work that requires at times great labor as well as skill, and it may be, as is often the case, that he is a mechanic, and that he is of the class mentioned in the statute whose wages are exempt. He is not an officer of the corporation which employs him, but is a servant thereof. He gives and has no power of direction, but merely obeys and carries out the orders and directions given to him by his superiors." In *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953, 21 S. E. 817, a United States mail carrier, who used his own horse and vehicle in transporting the mail between two points, was held a "laboring man."

2. *Employments Mainly Clerical.*—In *Abrahams v. Anderson*, 80 Ga. 570, 12 Am. St. Rep. 274, 5 S. E. 778, it was held that the wages of a private secretary and stenographer whose duty it is to receive by dictation and transcribe for his employer his letters and other documents and generally perform the duties of an amanuensis, including the keeping of such books as were kept in the office of his employer, who was a railroad president, was a "laborer" within the Georgia exemption statute. It was also held in *Lamar v. Chisholm*, 77 Ga. 306, that the wages of a clerk and bookkeeper were not subject to garnishment. In *Wells v. Southern Minnesota Ry.*, 1 Fed. 270, which was a suit to compel a defunct railway company to pay the salary of its secretary, under a decree requiring it to pay all sums

due "to any servant or employé," the court held that the secretary was an officer of the company and hence would not fall within the terms of the decree. In *Boynton v. Pelham*, 108 Ga. 794, 33 S. E. 376, it was held that a clerk in a railway company's office was a "laborer" within the exemption extended to laborers from garnishment. Shipping and receiving clerks were also held to be laborers in *Butler v. Clark*, 46 Ga. 466; *Claghorn v. Saussey*, 51 Ga. 576; but the wisdom of some of the earlier decisions of this nature were questioned in *Hinton v. Goode*, 73 Ga. 233, and *Oliver v. Macon Hardware Co.*, 98 Ga. 251, 58 Am. St. Rep. 300, 25 S. E. 403. In *Pike v. Sutton*, 115 Ga. 688, 42 S. E. 58, a clerk in a retail store who is one-half of the time employed in drudgery and hard work, one-fourth of the time in waiting on customers, and the balance of the time waiting for customers, was held to be a laborer within the meaning of the term "laborers" as used in the exemption law.

3. *Supervising Employés.*—As a general rule, employés who occupy positions in which they supervise or manage the conduct of the business are held not to be "laborers" within the terms of exemptory statutes. Thus, in *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90, a conductor on a passenger or freight train was held not within a statute exempting from execution the wages of a journeyman, mechanic or day-laborer, on the ground that, although he may perform manual labor, he is not employed for that purpose, "rather than on account of his skill and intellectual qualifications to discharge the important functions in overlooking and directing the operation of others engaged in running and managing the train of their common employer." So, also, in *McPherson v. Stroup*, 100 Ga. 228, 28 S. E. 157, a civil engineer engaged in superintending work, whose duty was to make surveys for grading, to examine and pass upon materials used, and to lay out work to be done by others, was held not a "laborer," although he may also have performed some manual work with his hands. The conclusion that a civil engineer was not a "laborer or workman" within the meaning of a lien law was also held in *Pennsylvania etc. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189. And in *Smith v. Brooke*, 49 Pa. St. 147, the compensation of a carpenter, who supervises the labor of hands employed by him in building a house were held not exempt from attachment under an act protecting the wages of laborers. In *Moore v. Heaney*, 14 Md. 559, the court came to the conclusion that the compensation of a person engaged to superintend the erection of a building was exempt, but the statute in that case did not limit the exemption merely to laborers. The court in that case said: "With reference to the persons entitled to exemption under the laws referred to, can it be a proper construction of those laws to say, the legislature intended to include laborers only, when the language used is, 'a laborer or other employé'?" A laborer, when engaged in service under contract for compensation, is an employé, but after saying a "laborer" there is added "or other employé."

Surely, in this was meant more than a laborer, or else, why, after using that word, add those which follow? If they only mean persons who are included within the meaning of the word "laborer," they are mere tautology and useless.

"In consideration of erecting and superintending the building mentioned in the contract, Quinlan was to receive, as compensation for his services, five per cent upon the cost of the building. And this five per cent, in our opinion, should be regarded as his 'wages or hire.'" And in *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392, 82 South. 433, the wages of a locomotive engineer in charge of a passenger train were held not exempt, the holding of the court being based on the fact that he is a highly skilled mechanic and has power to command those about him whenever necessary in the performance of his work. A person employed by a livestock company, as manager of its business, was held entitled to an exemption under a statute exempting "current wages for personal services," in *Bell v. Indian Livestock Co.* (Tex. Sup.), 11 S. W. 344, even though he was also a stockholder of the company. Plantation overseers were held to be laborers in *Caraker v. Mathews*, 25 Ga. 571; *Russell v. Arnold*, 25 Ga. 625; but the soundness of these decisions was questioned in *Kyle v. Montgomery*, 73 Ga. 343, where it was also held that a "boss" or director of an entire department of a large factory, who was authorized to employ and discharge hands and who had a hundred and fifty men under his supervision, was not to be regarded as "a journeyman mechanic or day-laborer" mentioned in the statute exempting the wages of such persons from garnishment.

c. Employments in Nature of Independent Contractors.

1. *In General.*—As we have seen, laborers are those who perform with their own hands the contract they make with their employers, and not those who are mere contractors to have work performed and whose compensation is the profit realized on the transaction. Hence it is the general rule that independent contractors do not come within the protection of statutes exempting the wages or earnings of laborers: *Johnson v. Barrills*, 27 Or. 251, 50 Am. St. Rep. 717, 41 Pac. 656. In *Henderson v. Nott*, 36 Neb. 154, 38 Am. St. Rep. 720, 54 N. W. 87, it was held that one who contracts to manufacture brick at a fixed price per thousand, furnishing and paying all help, keeping the machinery in repair and feeding a team supplied by the other contracting party, was not a "laborer" within the meaning of a statute providing that no property of a debtor shall be exempt from levy and sale on execution or attachment for clerk's, laborer's or mechanic's wages." So, also, in *Fox v. McClay*, 48 Neb. 820, 67 N. W. 888, the court in again construing the statute just mentioned held that one who makes a pair of boots upon a written order is an independent contractor, and hence not within the contemplation of said statute. In *Tatum v. Zachry*, 86 Ga. 573, 12 S. C. 940, debts due a blacksmith

for work done by him as the proprietor of a blacksmith-shop were held not exempt from garnishment under the provisions of the statute which exempts "the daily, weekly or monthly wages of journeymen, mechanics and day-laborers."

2. Occupations in Which Laborer has a Helper.—A distinction, however, seems to be drawn in some occupations, such as mining, where the person employed to perform certain manual labor has an assistant to do part of the more inferior work. The case of *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241, illustrates the rule. In that case the work was that of coal mining. The miners were assigned a certain chamber in which to extract the coal, and were paid a fixed sum per ton for the coal mined, but were furnished the powder used in blasting connected with the work. The court stated the reason for this rule in the following language: "Mining, being an art that requires considerable skill to carry it on with safety and success, those whom the company employ to conduct a chamber are expected to work in it themselves. The powder and oil are intrusted to them. They in fact do the mining. The common laborer they employ is to remove the coal and rubbish out of the way of the miners as fast as it is detached. For this superior skill and care the miners should receive more compensation than the mere heaver, and Welch's testimony is a clear exhibition of the mode in which these respective values are adjusted. But the labor of the miner is as truly labor as that of the subordinate whom they employ—and their earnings as truly wages as are his. If the proviso would protect his earnings from seizure (a point that is not doubted), it must be held to protect the earnings of the miners. Any other construction would embarrass a large and productive branch of industry, which doubtless has adjusted itself in the best form for both employer and employé, and would also discriminate unfairly against the most meritorious class of laborers. Without the skill of the miner, there would be no mining, or if there were, it would be done at continual peril of human life. The miner is not a contractor who stands off and appropriates the profits of other men's labor, but he leads the way into the subterranean chamber, directs every arrangement and movement, and performs the efficient labor with his own hands. The statute does not define the labor meant to protect, and it might be difficult to construct a perfectly satisfactory definition, but there can be no doubt that wages earned by the personal, manual labor of the debtor are under the cover of the statute. In legislative judgment such wages belong rather to the laborer's family than to his creditors. And such was the fund attached. Whatever earnings of labor in other forms may be within or without the statute, we cannot doubt that these earnings are within its policy as well as words, and therefore they must be held exempted." In *Smith v. Brooke*, 49 Pa. St. 150, the court, in holding the compensation of a master carpenter, who was paid one dollar and fifty cents a day for his own labor, and one dollar a day for each of his hands, not exempt, adverted to the

case just cited and stated that the intent of the statute was to secure to the laborer and his family the earnings of his own personal manual toil and not the profits which he might derive from the labor of others. In this connection, see also, *Rikerd Lumber Co. v. Chrouch* (Mich.), 98 N. W. 739; *Brainard v. Shannon*, 60 Me. 342.

In *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408, it was held that where a flour inspector passes upon every sample himself, the net proceeds of his business are his "earnings," although he employs subordinates. But a distinction appears to be drawn where the business in which the debtor is engaged is a mercantile business. Thus, in *Mulford v. Gibbs*, 9 App. Div. 490, 41 N. Y. Supp. 273, the debtor was engaged in the business of buying ice and retailing it to various customers, using several ice carts and several men in the conducting of his business. The court held that the business was one capable of increase and extension, and that the compensation of the debtor was dependent upon the profits realized, and were not "earnings from his personal services."

III. Exemption as Dependent upon Characterization of the Compensation.

a. *Mode of Payment, in General.*—"The mode of payment is not material in considering whether a sum due is wages. If one person is hired to work for and under the direction of another at any manual labor, the compensation to be paid therefor is wages, whether it be in the form of a commission upon a sum realized or produced, or measured by the amount of work done": *Freeman on Executions*, sec. 234. Although many of the statutes characterize the compensation by various terms, such as wages, salaries or earnings, still it seems that primarily the test of the exemption depends upon the character of the work for which the compensation is given. The construction of the various terms employed in such exemption statutes always relate to the question whether the compensation in the particular case is to be exempt or not, regardless of whether the compensation be payable at any particular interval, unless the exemption is expressly made dependent upon the time of payment. In *Protho v. Grubbs*, 71 Ga. 863, the wages of a farm laborer working under a six months' contract at a stated price was held not subject to garnishment where he might at any time call for such portion of his wages as he might require for his use. And in *Rikerd Lumber Co. v. Chrouch* (Mich.), 98 N. W. 739, the exemption was allowed to the extent allowed by the statute where the amount due the debtor was a total sum for the job instead of daily wages.

b. *Meaning of Terms "Wages" and "Salary."*—"The word 'wages' means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service or a fixed sum for a specified piece of work—that is, payment may be by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time

spent in the service, but it may also be determined by the work done. 'Wages' means compensation estimated in either way": Ford v. St. Louis etc. Ry. Co., 54 Iowa, 728, 7 N. W. 126. See, also, Freeman on Executions, sec. 234; Swift etc. Co. v. Henderson, 99 Ga. 136, 25 S. E. 27; Moore v. Heaney, 14 Md. 559; Hamberger v. Marcus, 157 Pa. St. 133, 37 Am. St. Rep. 719, 27 Atl. 681; Adcock v. Smith, 97 Tenn. 373, 56 Am. St. Rep. 812, 37 S. W. 91. In Fox v. McClay, 48 Neb. 820, 67 N. W. 888, it was held that the term "wages" also includes the idea not merely of one person working for another, but also that he shall work under the direction of the latter and not as an independent contractor. In South etc. R. Co. v. Falkner, 49 Ala. 115, the court, in discussing the question, said: "The act referred to provides 'that hereafter the wages of laborers and employes shall not be subject to garnishment or attachment except for public dues.' The president of a railroad company cannot be said to be a laborer or employe within this law. The term 'wages' indicates inconsiderable pay, without excluding 'salary'—which is suggestive of larger compensation for personal services. But its application to laborers and employes certainly conveys the idea of a subordinate occupation which is not very remunerative; one of not much independent responsibility, but rather subject to immediate supervision."

The distinction between wages and salary was also adverted to in Bell v. Indian Livestock Co. (Tex. Sup.), 11 S. W. 344, wherein it was said: "'Wages' are the compensation given to a hired person for service, and the same is true of 'salary.' The words seem to be synonymous, convertible terms, though we believe that use and general acceptance have given to the word 'salary' a significance somewhat different from the word 'wages' in this: that the former is understood to relate to position or office, to be the compensation given for official or other service, as distinguished from 'wages,' the compensation for labor. It is of little or no importance, however, in determining the question now being discussed whether the distinction here suggested be recognized or not. We have to deal with the phrase 'current wages,' without other limitation as to time or amount, and we think the exemption would apply without regard to whether the compensation be called 'wages' or 'salary.'"

In Hamberger v. Marcus, 157 Pa. St. 133, 37 Am. St. Rep. 719, 27 Atl. 681, it was held that the difference between "wages" and "salary" was immaterial in determining the question of exemption. In McCormick v. Vaughn, 130 Ala. 314, 30 South. 363, it was held that wages, salary or compensation for personal services was personal property within the meaning of the exemption laws. And in Magers v. Dunlap, 39 Ill. App. 618, it was held that the insertion of the words "for labor" in a note given to a physician for his services do not import that the consideration was wages as a laborer or servant within the meaning of the exemption laws.

c. Meaning of "Current Wages."—The term "current wages" used in the Texas statutes exempting "current wages for personal

services" was defined as follows: "'Current wages' are such compensation for personal services as are to be paid periodically or from time to time, as the services are rendered; as where the services are to be paid for by the hour, day, week, month or year. Such as that, the compensation therefor is measured by the time of the continuance of the service": *First Nat. Bank v. Graham* (Tex. App.), 22 S. W. 1101; *Sydnor v. Galveston*, 4 Civ. Cas. Ct. Ap. 94, 15 S. W. 202. Wages voluntarily left by the employé in the possession of the employer after they become due cease to be "current wages, and hence are not exempt: *Bell v. Indian Livestock* (Tex. Sup.), 11 S. W. 344; *Davidson v. F. H. Logeman Chair Co.* (Tex. Civ. App.), 41 S. W. 824. But such is not the case where they are left with the employer because the employé is unable to collect them: *Davidson v. F. H. Logeman Chair Co.* (Tex. Civ. App.), 41 S. W. 824.

d. *Commissions or Wages and Commissions.*—In *Hamberger v. Marcus*, 157 Pa. St. 133, 37 Am. St. Rep. 719, 27 Atl. 681, it was held that a factor's or broker's commissions would not come within the provisions of an act exempting the wages of laborers or the salary of a person in public or private employment, but in relation to traveling salesmen, the court said: "A traveling salesman who exhibits samples of and takes orders from purchasers for his employer's goods is not, in a technical or popular sense, a broker or factor, although he may be compensated for his services by commissions on the sales so effected by him. A salesman in the store of his employer may be paid for his services in like manner without becoming a commission merchant or taxable as a broker. In these cases the commissions are paid for personal services, and, as we have already seen, are fairly within the scope of the act." Of course, where the statute allows the exemption of wages only to "laborers," the right to the exemption is determined by a consideration of whether the commercial traveler can be considered a laborer, regardless of whether he is paid by means of commissions or salary: See *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192, 20 S. E. 40; *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, 43 N. W. 792. In *Weems v. Delta Moss Co.*, 33 La. Ann. 973, it was held that an agent or salesman soliciting sales of goods on a monthly salary and a commission on all sales effected by him was not a clerk within the meaning of the law which secures by privilege the payment of the wages of that class of employés.

But in *Brierre v. Creditors*, 43 La. Ann. 423, 9 South. 640, a person engaged under a contract to sell goods in a particular state with an agreement to receive one-half of the profits and bear one-half of the losses of the business done was held not to be a "clerk" nor his remuneration to be a "salary" under the exemption law just referred to.

e. *Compensation Measured by Work Performed.*—The rule was expressed in *Adcock v. Smith*, 97 Tenn. 373, 56 Am. St. Rep. 810, 37 S. W. 91, in the following language: "We are unable to see why a

laborer should be deprived of this exemption because his labor is compensated by the job or by the amount of work done or number of articles finished, instead of by the number of hours he is employed. He is no more an independent contractor when he agrees to puddle iron at so much per ton, than he would be if he were to receive so much per day. In either case, he is laboring with his own hands for an employer, and under his direction and control and superintendence, and he is in no sense an independent contractor, working when and how he may choose. Our farmers employ laborers to pick cotton for them at a certain rate per one hundred pounds, or to cut wood at a certain rate per cord, and the manufacturer employs laborers to weave cloth at so much per yard, and the mine owner employs laborers to mine coal by the ton, and so on through the various industries, and certainly in such cases the persons employed are 'laborers' working for 'wages,' the amount of which is fixed, not by the time engaged, but by the results achieved, and the law applies in the one case as well as in the other." See, also, *Ford v. St. Louis etc. Ry. Co.*, 54 Iowa, 728, 7 N. W. 126; *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241, already referred to.

In *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27, it was held that where the compensation of an ordinary laborer in a factory is so many cents per "hank," and his compensation is payable bi-weekly, the compensation is "wages" within the meaning of the exemption law. So, also, in *Moore v. Heaney*, 14 Md. 558, it was held where the compensation for superintending the construction of a warehouse was five per cent of the cost, the compensation was exempt "wages or hire." And in the very recent case of *Johnson v. Hicks* (Ga.), 48 S. E. 383, it was held that the compensation of a locomotive engineer paid monthly according to the number of miles he has run his locomotive during the month is "wages" within the terms of the exemption statute.

f. *Earnings*.—The court, in *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408, in defining the meaning of the term "earnings" used in an exemption statute, said: "It is not easy, perhaps, to determine the precise application of this word as used in the statute. I think a correct definition to be, the gains of the debtor derived from his services or labor without the aid of capital. If the debtor has no capital and no credit contributing to increase his profits, except the credit arising from the labor or service in which he is presently engaged, and out of the proceeds of which his obligations on account of such labor or service are to be discharged, then I think his net receipts or gains from such labor or service may fairly be accounted 'earnings.' If, for example, the man whose business it is to dig a well, sink a mine, erect a house, run a raft of lumber or a ferry-boat, or to perform any of the numerous kinds of work in which the assistance of others is necessary, employs others, as he must do, to assist him, and who are to be paid as he himself is paid, out of the proceeds of the work, it seems to me that what remains after the

others are paid must be regarded as his 'earnings.' We all know that there are many men who have a peculiar skill and adaptation to these different kinds of labor—who, from long application and experience, are qualified to assume the management and control of them, and of others engaged in them, and when they do so under the circumstances stated, why may not their gains, increased perhaps beyond the gains of others who have no skill and experience, be said to be the result of their personal services? I must say that I think they are the 'earnings'—the fruits of the proper skill, experience, and industry—of the persons to whom they belong." And in *Dayton v. Ewart*, 28 Mont. 156, 98 Am. St. Rep. 549, 72 Pac. 420, the court stated the rule as follows: "Mr. Freeman, in his work on Executions, section 234, says: 'Between the terms "wages" and "salary" there is no material difference when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term "earnings" is more comprehensive than either of the others. It implies, as do they, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor.'

"Nor do the words 'personal services rendered' necessarily contemplate that the services be rendered another. They may, in proper cases, mean the services which one renders to himself."

In *McCoy v. Cornell*, 40 Iowa, 457, a statute exempting the "earnings of such debtor for his personal services" was under consideration, and the court held that the statute made no distinction between professional men, mechanics or common laborers. So, also, in *Mulford v. Gibbs*, 9 App. Div. 490, 41 N. Y. Supp. 273, it was stated that where one carries on any business in which he employs clerks or other assistants, and is dependent for compensation upon the profits realized, such profits are not "earnings for personal services." And in *Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546, in determining whether a certain sum received by the judgment debtor for milk was exempt as "earnings for personal services," the court said: "How much assistance he had in working his farm does not appear. Whether he himself did a particle of work in the dairy does not appear. The case seems barren of proof that this money was the result of his personal services, and for that reason, without discussing whether it could be considered as his earnings for personal services within the meaning of section 2463 of the code, had it been produced by his labor alone, the claim that it was exempt cannot be sustained. But even if it be conceded that the defendant alone had done the work of the farm, I am of the opinion that this money could hardly be considered as having been received as earnings for his personal services rendered within the last sixty days. It was rather the pro-

ceeds of a business carried on by him, and within the authority of *Prince v. Brett*, 21 App. Div. 190, 47 N. Y. Supp. 402, than within the principles of the cases cited by defendant's counsel." In *Shelby v. Smith*, 59 Iowa, 455, the court, in holding that money due from boarders was not exempt as earnings for personal services, based its ruling on the fact that in the business of keeping boarders there were other elements, such as compensation for the use of the premises, including their value and location, the profits upon the raw material used and the general character of the establishment: See, also, *Youst v. Willis*, 5 Okla. 170, 49 Pac. 56, to the same effect. And following along the same line, it was held in *Prince v. Brett*, 21 App. Div. 190, 27 N. Y. Supp. 402, that money received by a saloon-keeper in the conduct of his business could not be regarded as "earnings" from his personal services. But in *Banks v. Rodenbach*, 54 Iowa, 695, 7 N. W. 153, it was held that money due a subcontractor, who has furnished no capital is exempt as "earnings." And in *Kuntz v. Kinney*, 33 Wis. 510, it was held that earnings made by a debtor with the assistance of his team and other exempt property, were exempt. And in *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533, it was held that the compensation of an artist who agreed to paint a portrait for a gross sum, was exempt as "earnings," even though he furnished the paint and canvas, since the value of those articles was insignificant compared with the whole price paid for the portrait.

IV. Exemption as Dependent upon Debtor Being Head of a Family.

Some of the statutes allow the wages or earnings of the debtor to be exempt providing that he is the "head of a family." Of course, under such circumstances, the debtor must show that he comes within the meaning of the term "head of a family" in order to be allowed the exemption. The cases bearing on the subject, who is the head of a family, were collected in the monographic notes to *Wade v. Jones*, 61 Am. Dec. 586, and *Wike v. Garner*, 70 Am. St. Rep. 107. The subject was also discussed in *Emerson v. Leonard*, 96 Iowa, 311, 59 Am. St. Rep. 372, 65 N. W. 153; *Cox v. Martin*, 75 Miss. 299, 65 Am. St. Rep. 604, 21 South. 611; *Bovard v. Ford*, 83 Mo. App. 498; *Jarboe v. Jarboe* (Mo. App.), 79 S. W. 1162; *Maag v. Williams*, 92 Mo. App. 674; *Roberts v. Moody*, 30 Neb. 683, 27 Am. St. Rep. 426, 46 N. W. 1013; *Rolator v. King*, 13 Okla. 37, 73 Pac. 291; *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755, 88 N. W. 706. Sometimes, however, the exempting statute allows the exemption to one who is a "householder": See the monographic note to *Wade v. Jones*, 61 Am. Dec. 586.

V. Exemption as Dependent upon Use of Funds for Support of Debtor's Family.

The statutes in some of the states make the exemption dependent upon whether the wages or earnings of the debtor are necessary for the support of his family: See *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747; *Duffey v. Reardon* (Ohio), 71 N. E. 712. The statute

construed in *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408, allowed the earnings of the debtor to be exempt when it appeared by the debtor's affidavit or otherwise that such earnings were necessary for the use of a family supported wholly or in part by his labor. A later statute exempted the "earnings of all married persons having families dependent upon them for support": See Wis. Laws 1889, sec. 2982. See, also, Cal. Code Civ. Proc., sec. 690, for a similar statute.

The Montana statute also makes the necessity for use of the family a part of its exemption statute: See *Dayton v. Ewart*, 28 Mont. 153, 98 Am. St. Rep. 549, 72 Pac. 420. The court, in *New Mexico Nat. Bank v. Brooks*, 9 N. Mex. 113, 49 Pac. 947, in construing a statute which exempted to the debtor his personal earnings necessary for the support of himself and family, said: "The defendant also testified that these earnings during this time was necessary to the support of himself and his family dependent upon him in the style and mode of living to which he and his family had been accustomed, and that the expenses for the support of himself and his family for any given year were about three thousand six hundred dollars. The court found that the money garnished was necessary to the support of the defendant Brooks and his family, and ordered that it be paid by the clerk of the court to the defendant. We are of the opinion that the court below erred in finding that the money so garnished was exempt under the statute, because it appears from the defendant's own testimony that his expenses for himself and his family for any given year were about two thousand dollars less than his own personal earnings, besides the six hundred dollars per year, the personal earnings of one of his sons. We do not think the facts disclosed by this record warrant the finding of the district court. The legislature, in conformity with public policy now generally prevalent, enacted the exempting statute to encourage the formation of the family relation by conferring upon the heads of households privileges to protect their families against want in the event of misfortune, but it was never intended that these generous provisions should be prostituted to the encouragement of extravagance, and the evasion of just indebtedness by indulgence in luxurious living. The statute exempts the personal earnings of the debtor entitled to its benefits to the amount necessary for the support of his family, and courts, in administering the law, should take into due consideration the facts and circumstances of each case. An allowance ample for a household of simple and moderate habits would be inadequate for one accustomed to abundance, and it would be not less harsh to deny to the latter means commensurate with their reasonable necessities than to fail to accord to the former a liberal proportion of his earnings. In the case at bar it is manifest from the facts in the record that the defendant was earning at the time under about two thousand dollars per year more than the sum required and necessary for the support of himself and family. It is a matter of common knowl-

edge that three thousand six hundred dollars is more than ample and sufficient to support any average family in comfort and ease."

VI. Exemption of Specific Amount.

In some of the states the amount allowed to be claimed as exempt by the debtor is limited to a specific amount, such as fifty per cent of the wages due the debtor (Del. Rev. Code 1890, p. 841), or one-half of the earnings of the judgment debtor for his personal services (Utah Rev. Stats., secs. 3241, 3243), or in some states an amount not to exceed twenty-five dollars per month: *Enzor v. Hurt*, 76 Ala. 595; *Bliss v. Smith*, 78 Ill. 359; *Hart v. O'Rourke*, 151 Ind. 205, 51 N. E. 330. Naturally, where a specific amount is exempted by the statute there is not much room for construction.

In *Lafferty v. Sistalla*, 11 Wyo. 360, 72 Pac. 192, under a statute providing that one-half of the earnings of a judgment debtor shall be exempt, and that "there shall be exempt in all cases a sum not to exceed fifty dollars," it was held that in no case shall the exemption be reduced to less than fifty dollars. And in *Enzor v. Hurt*, 76 Ala. 595, it was held that where a debtor is entitled to claim as exempt personal property to the amount of one thousand dollars, to be selected by him, and the wages of laborers to the amount of twenty-five dollars are also exempt from garnishment, the debtor may claim a balance due him as wages or salary, over and above the twenty-five dollars per month, as part of the one thousand dollars' worth of personal property to which he is entitled. A similar rule was enunciated in *Pomeroy v. Beach*, 149 Ind. 511, 49 N. E. 370; *Hart v. O'Rourke*, 151 Ind. 205, 51 N. E. 330.

In *Garside v. Colby*, 72 N. H. 544, 58 Atl. 50, it was held, under the New Hampshire statute, that where the judgment sought to be collected is for necessities furnished the defendant, that trustee process may be maintained against one indebted for wages to the judgment debtor in a sum less than twenty dollars, since the statute provides that wages to the amount of twenty dollars shall be exempt from trustee process except in actions for necessities.

VII. Exemption as Dependent upon Period During Which Earned.

In many of the states the exemption of the wages, salaries or earnings of the debtor is made dependent upon having been for labor or services performed by the debtor for a designated number of days preceding the garnishment or similar process: *Haynes v. Hursey*, 72 Me. 448; *Freeman on Executions*, sec. 234; *Chadwick v. Stout*, 112 Iowa, 167, 84 Am. St. Rep. 334, 83 N. W. 901.

Where the payment of the employé's salary is made in advance, no debt can accrue for wages or salary due to such employé, and hence the employer cannot be held liable as garnishee: *Archer v. People's Sav. Bank*, 88 Ala. 254, 7 South. 53; *Boyd v. Brown*, 120 Ind. 393, 23 N. E. 249; *Callaghan v. Pocassett etc. Co.*, 119 Mass. 173; *Worthington v. Jones*, 23 Vt. 546. But if the contract for payment of future earnings is made with intent to place them beyond

the reach of creditors, it is said that such a contract would be held fraudulent: *Reinhart v. Empire Soap Co.*, 33 Mo. App. 24; *Worthington v. Jones*, 23 Vt. 546. In *Chadwick v. Stout*, 112 Iowa, 167, 84 Am. St. Rep. 334, 83 N. W. 901, it was held, under a statute providing that the personal earnings of a debtor "at any time within ninety days next preceding the levy" shall be exempt from liability for his debts, the period of time during which litigation to recover such earnings may be pending cannot be eliminated in the computation of such ninety days. In *Gray v. Fife*, 70 N. H. 89, 85 Am. St. Rep. 603, 47 Atl. 541, it was held that wages for labor performed by defendant after service upon the trustee are not exempt from attachment if they are inseparable from the other indebtedness of the trustee which is not exempt.

But, on the other hand, a creditor cannot, by garnishment proceedings, tie up in the hands of an employer separate amounts of money earned as wages by a laborer until the time exempting such wages has expired, and then, by another garnishment proceeding, appropriate these several amounts to the payment of his debt: *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 449. As bearing on the effect of successive writs of garnishment or similar process to tie up wages, see, also, *Bliss v. Smith*, 78 Ill. 359; *Collins v. Chase*, 71 Me. 434; *Quimby v. Hewey*, 92 Me. 129, 42 Atl. 344; *Hall v. Hartwell*, 142 Mass. 447, 8 N. E. 333; *Chapman v. Berry*, 73 Miss. 437, 55 Am. St. Rep. 546, 18 South. 918; *Bremer v. Mohn*, 169 Pa. St. 91, 32 Atl. 90.

VIII. Mode of Construing Exemption Statutes.

"It is of primary importance that the practitioner should understand the spirit in which the statute of his state will be received and construed by its courts. While it is true that lands were not subject to execution at common law, their exemption was dictated by other considerations than those of benevolence to the debtor and his family. That there should be property which in its nature was generally subject to execution, but which was exempt for certain persons or in certain cases, to mitigate the misfortunes of debtors, was unknown to the common law. Statutes of exemption, whether referring to real or personal property, may, therefore, properly be characterized as in derogation of the common law; and if there were a universal rule that statutes in derogation of the common law must be strictly construed, then such a construction of statutes of exemption would be unavoidable. This construction has in fact been proclaimed in some instances. Where this rule prevails, no property can be successfully claimed as exempt which does not clearly appear to be embraced within the specification contained in the statute. But in most of the states it does not prevail, nor can it be permitted to prevail anywhere without forgetting that the 'quality of mercy is not strained.' We can hardly conceive the propriety of strictly construing a statute of mercy or benevolence. Unless its validity

can be wholly denied because of the want of legislative power to enact it, it should be given full effect by interpreting it in the spirit in which it was conceived and adopted, and with a view of accomplishing all its manifest objects. It is true that exemption laws are occasionally perverted from their laudable purposes. They sometimes enable debtors in comfortable circumstances to bid defiance to creditors more impoverished than themselves. They sometimes assist scoundrels to consummate the most cruel frauds. But in the vast majority of cases their operation is highly meritorious. They often assure to the family the shelter of a home, the means of obtaining a livelihood, and the earnings of its natural head and protector. They mitigate the harshness of the cruel and grasping creditor, and give to the most unfortunate of debtors a place of refuge and a gleam of hope. Because of their meritorious purposes and their remedial character, the courts have generally treated them with the utmost consideration, and have been inclined to extend rather than to restrict their operation. Hence, the rule is well supported, and is constantly growing in favor, that exemption laws, being remedial, beneficial and humane in their character, must be liberally construed. Wherever this rule prevails and it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property": Freeman on Executions, sec. 208.

In connection with the numerous authorities cited in Freeman on Executions, section 208, as supporting the rule that exemption statutes are to be liberally construed in favor of the debtor to carry into effect the purposes for which they were enacted, see *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272; *In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567; *Montague v. Richardson*, 24 Conn. 346, 63 Am. Dec. 173; *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990; *Elliott v. Hall*, 3 Idaho, 421, 35 Am. St. Rep. 285, 31 Pac. 796; *Finlen v. Howard*, 126 Ill. 259, 18 N. E. 560; *Pickrell v. Jerauld*, 1 Ind. App. 10, 50 Am. St. Rep. 192, 27 N. E. 433; *Morgan v. Roundtree*, 88 Iowa, 249, 45 Am. St. Rep. 234, 55 N. W. 65; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; *Equitable Life etc. Soc. v. Goode*, 101 Iowa, 160, 63 Am. St. Rep. 378, 70 N. W. 113; *Roberts v. Parker*, 117 Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 744, 57 L. R. A. 764; *Krebs v. Nicholson*, 118 Iowa, 134, 96 Am. St. Rep. 370, 91 N. W. 923; *Rustad v. Bishop*, 80 Minn. 497, 86 Am. St. Rep. 282, 83 N. W. 449; *Chapman v. Berry*, 73 Miss. 437, 55 Am. St. Rep. 546, 18 South. 918; *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459, 34 Pac. 1020; *Dayton v. Ewart*, 28 Mont. 153, 98 Am. St. Rep. 549, 72 Pac. 420; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681, 43 N. W. 361, 9 L. R. A. 523; *Yates etc. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855, 23 N. E. 1108; *Johnston v. Barrills*, 27 Or. 251, 50 Am. St. Rep. 722, 41 Pac. 656; *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465.

LITTLE v. SOUTHERN RAILWAY COMPANY.

[120 Ga. 347, 47 S. E. 953.]

RAILWAY EMPLOYÉ—Injury from Violation of Law.—A railway engineer cannot recover for injuries received in a collision proximately caused by his violation of a statute requiring the speed of trains to be checked at crossings, or by his violation of an ordinance limiting the speed of trains, although the railway company may have commanded him to disobey the law, or there had been such repeated disobedience as to amount to a custom. (p. 106.)

RAILWAY EMPLOYÉ—Knowledge of Rules.—A railway employé is not bound by any rule of the company of which he has no knowledge; but if he is furnished an opportunity to learn the rules, and by the exercise of ordinary care can acquaint himself with them, this amounts to knowledge. (p. 108.)

RAILWAY EMPLOYÉ—Contributory Negligence.—If the negligence of a railway employé appreciably contributes to his injury, his right of recovery is thereby defeated. (p. 108.)

APPEAL—Minor Errors.—Where the Controlling Question is the plaintiff's contributory negligence, and the charge of the court on this question necessarily controls the verdict, it will not be reversed for minor errors of law. (p. 109.)

Action by J. H. Little against the Southern Railway Company for injuries received from a collision between two switch engines, one of which he was operating as engineer. He was ordered to break up one train in order to make up another. To do this, it was necessary for him to pull his train a distance on the main track sufficient to clear a switch, and then push the cars back in a siding from this switch. He ran down the main line, and stopped after crossing the Central of Georgia Railway. The track of the Southern Railway was downgrade beyond the crossing, and he was unable to back his train into the switch. After several ineffectual attempts to do so, he started his train downgrade, running eight or ten miles an hour, and crossing two streets without checking his speed, and ran through a culvert on an abrupt curve into a switch engine coming from the opposite direction. The jury returned a verdict for the defendant, and the plaintiff appealed.

John R. Cooper, Marion W. Harris and J. H. Hall, for the plaintiff.

Dessau, Harris & Harris, for the defendant.

349 **EVANS, J.** 1. Within an hour after the plaintiff began to discharge his duties in shifting the cars, he violated two statutes of the state and a municipal ordinance of the city of

Macon. When he ran on the main line with his cars, he failed to observe the Civil Code, section 2234, which required him to stop within fifty feet of the place of crossing the Central railroad, which was an independent railroad. He did not stop before crossing the Central railroad, but immediately after clearing the same he brought his cars to a full stop. It was afterward that he ran his train down in the direction where the collision occurred. Plaintiff in error contends that in no sense was the failure to stop within fifty feet of the Central railroad crossing a contributing cause of the injury, for the reason that he had crossed the railroad and come to a full stop; and, even if he had been negligent in violating the statute requiring him to stop within fifty feet of the crossing, that, having stopped his train just beyond the crossing, his failure to observe the statute could not have contributed to the injury. On the other hand, the railway company insists that this was a downgrade, and if he had stopped within fifty feet of the crossing he would have been able to push the cars back into the siding; and that because of his failure to observe the statute, and in going beyond the Central of Georgia railroad crossing to a point so far downgrade, he was unable to push the cars back, and was guilty of negligence. The court submitted this issue to the jury, instructing them that unless they believe the failure on the part of the plaintiff to comply with this statute was a contributing cause of the injury, he would not be chargeable with negligence in failing to observe it. Section 2234 is primarily designed to prevent collision between the trains on the intersecting roads. Although the plaintiff did not comply with the statute in stopping within fifty feet of the intersecting road, he did bring his train to a full stop after crossing the track of the Central of Georgia Railway Company. Relatively to what occurred after ³⁵⁰ crossing that track, the failure to stop before he crossed it was not the proximate cause of the collision. Diligence might have required him to ask for assistance in backing his train, instead of moving farther downgrade, but his failure to stop his train within fifty feet of the railroad crossing is too remote to be regarded as a contributing cause of the collision with the other engine. But as the jury were instructed that this would not be an act of negligence unless it was found to be a contributing cause of the injury, and as the evidence demanded a finding that the injury proximately resulted from the violation of the statute requiring him to check the speed of his train while approaching a street crossing and in running

faster than was permitted by the municipal ordinance, the submission of this irrelevant issue should not have the effect of vitiating the only verdict which could properly have been rendered under the facts of the case.

After the plaintiff had stopped his train beyond the railroad crossing and was unsuccessful in his attempts to back the cars, he started forward at a speed estimated by the witnesses as from eighty to twenty miles an hour, crossing two streets in the city of Macon without checking the speed of his train. The court charged the Civil Code, sections 2222, 2224, requiring an engineer to check the speed of his locomotive within four hundred yards of such crossings, so as to be able to stop in time should any person or thing be crossing the track; and in this connection the court instructed the jury that if they believed that the failure of the plaintiff to observe this statutory requirement was a proximate cause of his injury, he would not be entitled to recover. There are several cases construing these sections of the code. Their application has been confined to injuries to person or property, occasioned by a railroad company at a grade crossing; and in these cases it has been held to be negligence per se not to comply with the statute. There has been no adjudication as to what effect a failure to observe this statute would have upon the engineer in the event he was injured at a point either on or near the crossing. The statute makes it the duty of the engineer, and not of the railroad company, to blow the whistle and check the speed of the train. If he fails to do this as required by the statute, he is subject to indictment for a misdemeanor; and if, in the commission of this criminal act, an injury results which could have been ³⁵¹ avoided but for the commission of that act, his right to recover from the railroad company will be defeated: 1 Labatt on Master and Servant, sec. 362; Missouri Ry. Co. v. Roberts (Tex. Civ. App.), 46 S. W. 270. The same may be said as to the violation of the speed ordinance of the city of Macon, which prohibits the running of trains in that portion of the city at a greater rate than five miles per hour. The plaintiff admits that at the time he sustained the injury the speed of his train was eight to ten miles an hour. When he collided with the other engine he was in actual violation of the speed ordinance of that city. He had just passed two street crossings without checking the speed of his train or attempting to do so. He rushed toward the impending collision in disobedience of the state statute requiring him to check the speed of his locomotive

at street crossings, and in disobedience of the municipal ordinance limiting him to a speed of five miles an hour. If his injury was caused by reason of a violation of either the statute or the ordinance, he would not be entitled to recover. But he says that he was commanded by the railroad company to disobey both the statute and the speed ordinance; and that even if there was no express command to that effect, there had been such repeated violations as to amount to a custom. It would be contrary to public policy for courts to relieve a citizen of the consequences of his act in violating the law or his duty to society; and it cannot be any defense that someone else either assisted in the offense or commanded him to do it: *Missouri Ry. Co. v. Roberts* (Tex. Civ. App.), 46 S. W. 270. It is no justification for one criminally responsible for his conduct that another commanded him to do an act which is inhibited by law. No custom, however universal, could have the effect of repealing a penal statute; and the mere forbearance of the corporation to prosecute for repeated violations of the ordinance would not amount to an implied repeal of the ordinance: *Central Ry. Co. v. Curtis*, 87 Ga. 425, 13 S. E. 757.

In *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385, a widow of a deceased employé sued the Western and Atlantic Railroad Company to recover damages because of the death of her husband by the alleged carelessness of the employés of the railroad company while her husband was acting as engineer. The defendant pleaded that at the time of the killing the railroad company was engaged in the transportation of insurrectionary troops to fight against the ³⁵² forces of the United States, and that the plaintiff, in propelling the train, was in resistance to the government of the United States. The court there ruled that where two or more parties are engaged in the same illegal transaction and one is injured by the negligence or carelessness of the other, the courts will not lend their assistance to either party to recover damages: See *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee Ry. Co.*, 48 Ga. 102. While approving the principle in the last three cases cited, we have serious doubt as to its application in those cases. It follows that if the railway company either commanded or connived at a violation of the penal law, the plaintiff, who was the actual perpetrator, could not recover of the defendant for any injury traceable to a violation of the statute.

2. The court charged that an employé of a railway company is not bound by any rule, regulation, custom or usage, not com-

municated to him, or furnished to him, or spoken or told him, and of which he had no knowledge and of which he could get no knowledge by the use and exercise of ordinary care and diligence. The error assigned upon this charge is that the law does not impose upon the employé the duty of exercising ordinary care in ascertaining the rules of the company; he is only bound by the rules promulgated by the company and of which he has knowledge. As applied to the evidence, the jury could have understood the charge only to mean that an employé is not bound by any rule of which he had no knowledge; but if there was furnished him an opportunity to learn the rules, and by the exercise of ordinary care he could have acquainted himself therewith, this would amount to knowledge. This statement of the rule is recognized in *Port Royal Ry. Co. v. Davis*, 95 Ga. 299, 22 S. E. 833; *Carroll v. East Tennessee etc. Ry. Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214.

3. In order for an employé of a railroad company to recover damages from the company for an injury received while in its employment, it must appear that he was free from fault. This principle has been stated in many forms. The charge of the trial judge on this subject was modeled on *Prather v. Richmond etc. Ry. Co.*, 80 Ga. 427 (2), 12 Am. St. Rep. 263, 9 S. E. 530. The statement of the doctrine that an employé of a railroad company cannot recover if he "immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all," has been approvingly cited in *Western etc. Ry. Co. v. Herndon*, 114 Ga. 168, 39 S. E. 911. In *Georgia R. R. etc. Co. v. Hicks*, 95 Ga. 301 (2), 22 S. E. 613, it was said that "the negligence of the plaintiff, however slight, which contributes in an appreciable decree to the cause of the injury, defeats a recovery." If the negligence of the employé appreciably contributes to the injury, he cannot be free from fault, and to recover he must show himself blameless.

4. Complaint is made that the contentions of the plaintiff were not fully submitted in the charge. If the plaintiff desired any further elaboration of his contentions, he should have made an appropriate request. The charge was very elaborate, and covered every material phase of the case, and submitted every substantial issue to the jury.

5. Plaintiff in error did not make a motion for a new trial, but by direct exception complains of the various rulings and charges of the court. When he pursued the latter course, he

staked his right to a reversal of the verdict upon strictly legal grounds. The controlling question in the case is the contributory negligence of the plaintiff in violating a penal statute and municipal ordinance. The charge of the court on this subject, applied to the evidence, necessarily controlled the verdict; and any minor errors of law will not have the effect of reversing the verdict.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed.

All the justices concur.

The Violation of a City Ordinance directly contributing to an injury caused by the negligence of another bars a recovery therefor; but in order to have such effect, the violation of the ordinance must have directly and proximately contributed to the injury: *Necomb v. Boston Protective Dept.*, 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555.

GAINES v. LUNSFORD.

[120 Ga. 370, 47 S. E. 967.]

WAY OF NECESSITY.—When a Grantor Conveys Land otherwise inaccessible, there is of necessity an implication that he unintentionally omitted to convey a means of access thereto; this implication entitles the land-locked grantee to a way out to whatever public or private roads furnished access to the original tract. (p. 110.)

WAY OF NECESSITY.—Connection with Private Road.—If the owner of a land-locked farm can reach a highway by means of another private or quasi public road, he is not under the necessity which alone entitles him to condemn the land of his neighbor as provided by the constitution of Georgia. (p. 111.)

WAY OF NECESSITY.—Road must be Necessary, not Merely Convenient.—The way of necessity contemplated by the Georgia constitution is not a way of convenience, nor is it intended to give the applicant the shortest route to market; if there is a defective road touching his land, or it is accessible without crossing his neighbor's property, the constitution does not warrant the taking of the latter's property to make a better highway. (p. 111.)

WAY OF NECESSITY.—The Fact that there is a Cut or Obstruction between a land owner's residence and a settlement road does not entitle him to a road across his neighbor's land to a highway. (p. 111.)

WAY OF NECESSITY.—Closing of Existing Road.—The fact that a settlement road touching one's premises may be closed does not justify the laying out of a way of necessity across adjoining lands. (p. 112.)

Samuel L. Oliver, for the plaintiff in error.

Joseph N. Worley, for the defendant in error.

370 LAMAR, J. There are no plats in the record to show the situation of plaintiff's and defendant's land, nor the location of the **371** public road, nor where the "settlement" roads referred to in the evidence touch the farm, nor indeed where the proposed way begins or ends. Even the plat referred to as attached to the petition is not brought up, and it is therefore difficult to determine where the private road is to start and with what it is to connect. Aided by the argument, however, we infer that plaintiff's residence is located near the center of his farm. It appears that for many years there has been a private way leading therefrom across the lands of Gaines, the defendant, to what we infer was a public highway. This path or way was not fifteen feet wide, its route had been changed from time to time, and it had not been worked by plaintiff and his predecessor in title; so that under the Political Code, sections 662, 678, no prescriptive right had ripened. Being unable to continue its use, he applied for the establishment of a way of necessity over practically the same route. The record shows that plaintiff's farm was touched by two "settlement" roads, and that he could have reached either over his own land and without crossing the plantation of Gaines. It is claimed, however, that a farm road from plaintiff's dwelling would have had to cross a deep cut or obstruction in his field; that it would have been expensive to construct the route over the same; and that a way thus laid out would lead to settlement roads which were steep, hilly and in such bad condition that it was impossible to haul thereon more than half a load.

At common law, where the grantor conveyed land otherwise inaccessible, there was of necessity an implication that he had unintentionally omitted to convey a means of access thereto. This necessary implication entitled the land-locked grantee to a way out to whatever public or private roads furnished access to the original tract—in the laying out of which due regard, of course, had to be had to the convenience of the grantor. Such ways by implication are still recognized in this state: Civ. Code, sec. 3065. But, in addition to these common-law ways of necessity, the constitution provides for acquiring similar easements over the land of those with whom the applicant had no privity of estate, declaring (Civ. Code, sec. 5729) that, "in cases of necessity, private ways may be granted upon just com-

pensation being first paid by the applicant." It does not provide whether he shall have a right to reach a highway, or some private way ultimately leading to a highway ³⁷²—though there are in the books some suggestions that the way of necessity contemplated under similar statutes elsewhere is one which connects the private land with a public road: See notes in *Pettingill v. Porter*, 85 Am. Dec. 677. But the use of the common-law phrase "way of necessity," and the many authorities holding that wherever necessity ceases the right to such way ceases (Civ. Code, sec. 3066), lead to the conclusion that if the owner of the land-locked farm can reach a highway by means of another private or quasi-public road, he is not under that necessity which alone entitles him to condemn the land of his neighbor. Such was the ruling in *Chattanooga Ry. Co. v. Philpot*, 112 Ga. 154, 37 S. E. 181, where Justice Cobb said: "If there is a way by which the applicant can lawfully reach his farm or place of residence, a case of necessity does not exist." There the owner of land could reach a private way which extended to the public thoroughfare. In *Turnbull v. Rivers*, 3 McCord, 131, 15 Am. Dec. 622, it was held that if the land can be reached by a distant or difficult road, the grantee is not entitled to a way across the lands of the grantor.

2-4. The settlement roads are in bad condition, but not impassable. Access to a public and better road would be more advantageous. But the way of necessity contemplated by the constitution is not a way of convenience, nor is it indeed intended to give the applicant the shortest route to market. If there is a defective road touching his land, or it is otherwise accessible without crossing the property of the abutting owner, the constitution does not warrant taking the latter's property in order to reach a better highway. That would serve the applicant's ease rather than his necessity. The defects in these highways or private ways must be corrected at the expense of the public, the applicant, or others having occasion to travel thereon. The delays, expenses and burdens cannot be avoided by taking the land of another, even on just compensation. Nor does the fact that there was a cut or obstruction in plaintiff's farm between his residence and the settlement road change the legal complexion of this case. The burden of crossing these natural barriers falls upon him, and not upon another. "A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way to his own land may be": *Dee v. King*, 73 Vt. 378, 50

Atl. 1109. Particularly is this true where the record does not show the character of the ³⁷³ obstruction, its nearness to the highway, the additional cost of construction, and its relation to the value of the tract. There might be cases where one side of a plantation is bounded by a highway with precipice, morass or other natural obstruction of a character that makes it not absolutely impossible to reach the outlet to market, yet the expense would be so out of proportion to the value of the estate as to warrant laying out a way of necessity, in an opposite direction, to a road beyond the land of an intervening owner. Nothing of that sort appears here.

Under the Philpot case it was error to allow testimony that the existing settlement road might be closed against the use of plaintiff. He can travel thereon at the present time. That right makes it unnecessary to use the land of defendant. When the way is closed, it will be time enough to determine whether proceedings should be taken to reopen that or to grant another over the land of defendant.

Judgment reversed.

All the justices concur.

A Way of Necessity arises where land is conveyed surrounded by other land: *Bonelli Brothers v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 South. 228; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966. There must be at least a reasonable necessity to give rise to such a way; mere inconvenience, however great, will not do. It is necessity, and not inconvenience, that gives the way: See the monographic note to *Pettingill v. Porter*, 85 Am. Dec. 676.

SOUTHERN RAILWAY COMPANY v. BANDY.

[120 Ga. 463, 47 S. E. 923.]

CARRIER must Stop to Allow Passenger to Alight.—If a railway company accepts fare to a particular station, it is bound to stop the train there to allow the passenger to alight; to slacken the speed is not sufficient. (p. 114.)

CARRIER—Passenger Alighting from Moving Train.—If a passenger, under the direction of the conductor, gets off a slowly moving train, the railway company is liable for consequent injuries. (p. 114.)

CARRIER.—A Passenger cannot Rely on the Conductor's Instructions to do an act obviously dangerous. (p. 114.)

Action by Bandy for injuries sustained in alighting from a train at night. He testified as follows: "I got on the train at Dalton, for Miller's Station. . . . It was about an hour or an hour and a half behind, as well as I remember. I paid the conductor my fare, . . . the amount demanded by the conductor. As the train approached Miller's the conductor came to the front door and motioned me out on the front platform, and says, 'I am just going to slow up here, as we are behind time, and I want you to get off.' The train ran about one hundred and fifteen yards below the regular stopping-place, and he slowed up some; he passed the crossing about one hundred yards, and it appeared to be running at a reasonable rate, so that it would be safe to get off. I couldn't tell the rate he was running. He punched me and says, 'Now is the time to get off.' The porter and flagman was standing there with him on the platform. I got off then. . . . I done as he told me to, and my foot hit a rock and throwed me . . . and bruised my leg up," etc. "There is ballast there. My foot alighted on a rock, and the rock rolled and caused me to fall. . . . It appeared reasonably safe to get off at the time and place. I wouldn't have gotten off then if the conductor hadn't told me—if it hadn't been for his command. . . . I was sitting in the car, and the train gave a signal for Blue Springs, the conductor came to the door and motioned me out to the front, and when I got to where he was at, the train lacked about a half a mile of being to Blue Springs. . . . There is no station-house at Miller's used for taking on and discharging passengers; the point where they take on and discharge passengers is where the road crosses the railroad." The conductor testified that he repeatedly requested Bandy not to be in a hurry, and not to get off the train until it stopped; that he signaled the engineer to stop the train, and it did not run over one hundred feet after Bandy jumped off; and that the train was not running over five or six miles an hour when the accident happened. The conductor's testimony was corroborated by other witnesses. There was a verdict for the plaintiff.

Shumate & Maddox, for the plaintiff in error.

R. J. and J. McCamy, W. C. Martin and W. M. Jones, for the defendant in error.

484 LAMAR, J. The evidence was directly in conflict, but the testimony for the plaintiff brought the case within the de-

cision in *Georgia R. R. Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577, where it was held that if the company accepts the fare to a particular station it is bound to stop, and it is not sufficient that the speed is slackened. If under the direction of the conductor a passenger gets off of a slowly moving train, the company is liable for consequent injuries, it not being a want of ordinary care if the passenger prudently uses the means which the company affords him for disembarking: *Western Ry. Co. v. Young*, 51 Ga. 489; *Central Ry. Co. v. Smith*, 69 Ga. 273; *Jones v. Georgia etc. Ry. Co.*, 103 Ga. 570, 29 S. E. 927. In such a case it is immaterial whether the direction to alight from the moving train was given while the passenger was in the coach or on the steps, the length of time between the order and the alighting being unimportant. Of course, the passenger could not rely on the conductor's instruction if it was obviously dangerous to conform thereto; ⁴⁶⁵ but the evidence here was that the train was moving slowly, and the jury had the right to believe this statement and the further testimony of the plaintiff that he thought it reasonably safe to obey the conductor's command.

Judgment affirmed.

All the justices concur, except Candler, J., disqualified.

When a Railway Company fails to bring its train to a full stop at a station, it is answerable for injuries sustained by a passenger in attempting to get off, if, under all the circumstances, it was prudent for him to make the attempt: See the note to Walker v. Vicksburg etc. R. R. Co., 17 Am. St. Rep. 424. Consult, in this connection, Kansas City etc. R. R. Co. v. Little, 66 Kan. 373, 97 Am. St. Rep. 376, 71 Pac. 820. Alighting from a moving train is not necessarily negligence: New York etc. R. R. Co. v. Coulbourn, 69 Md. 360, 9 Am. St. Rep. 430, 16 Atl. 208, 1 L. R. A. 541; Louisville etc. R. R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; Ober v. Crescent City R. R. Co., 44 La. Ann. 1059, 32 Am. St. Rep. 366, 11 South. 818. But see Weber v. Kansas City etc. Ry. Co., 100 Mo. 194, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587; Neff v. Harrisburg Traction Co., 192 Pa. St. 501, 73 Am. St. Rep. 825, 43 Atl. 1020; note to Walker v. Vicksburg etc. R. R. Co., 17 Am. St. Rep. 424-429. As to the right of a passenger to rely upon the conductor's directions in getting on or off a train, see Chicago etc. R. R. Co. v. Gore, 202 Ill. 188, 95 Am. St. Rep. 224, 66 N. E. 1063; Evansville etc. R. R. Co. v. Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469; Irish v. Northern Pac. R. R. Co., 4 Wash. 48, 31 Am. St. Rep. 899, 29 Pac. 845.

BANK OF CULLODEN v. BANK OF FORSYTH.

[120 Ga. 575, 48 S. E. 226.]

CORPORATE STOCK—Negotiability.—While corporate stock is not negotiable in the full sense, the custom of business, the necessities of commerce, and the multitude of transactions tend more and more to force its transfer under the rules applicable to the sale of negotiable instruments. (p. 117.)

CORPORATE STOCK—Secret Lien.—A By-law Lien on corporate stock is not good as against a pledgee or transferee without notice. (p. 117.)

CORPORATE STOCK—Bona Fide Holder.—A Statement on a certificate of stock that it is transferable only on the books of the corporation does not charge a pledgee with notice of what can be learned from an examination of the books, including facts pointing toward the existence of a by-law lien on the stock. (p. 117.)

CORPORATE STOCK—Transfer on Books.—A Provision that stock is transferable only on the books of the corporation does not, as between the parties, preclude a transfer without an entry on the books. (p. 117.)

CORPORATE STOCK—Transfer Without Indorsement.—Where stock is delivered as security for the payment of a note, though without a transfer on the back of the scrip, and the note recites that the stock is deposited to secure the debt and that on default a sale may be made, a purchaser at the sale is entitled to a transfer of the stock on the books of the corporation, and to a new certificate. (p. 117.)

CORPORATE STOCK—Damages for Refusal to Transfer.—The measure of damages for refusing to make a transfer of stock on the books of the corporation, and issue a new certificate to a purchaser at a sale made by a pledgee of the shares, is the value of the stock at the time of the refusal. (p. 118.)

Hardeman & Jones and Davis & Turner, for the plaintiff in error.

Robert L. Burner, for the defendant in error.

578 LAMAR, J. The Bank of Culloden was incorporated October 11, 1897, under the provisions of the Civil Code, section 1903 et seq. On January 6, 1898, it adopted the following by-law: "No transfer of stock shall be valid until entered on the books of the bank and all arrearages paid. Such transfer must be made at least fifteen days before an election, to entitle the holder thereof to vote; and it is expressly understood that this bank has a lien on all stock to the extent of indebtedness of each or any stockholder, whether such indebtedness is due or is to become due." The Allen Merchandise Company owned six shares of the stock, and was indebted to the

'bank. The stock certificate was silent as to the lien, but had the usual provision that the stock was "transferable only on the books of the corporation, in person or by attorney, on surrender of the certificate." On February 12, 1902, the owner deposited the certificate with the Bank of Forsyth, as security for a loan of five hundred and forty dollars, represented by a note for that amount. There was no transfer on the back of the scrip. The note, however, was on a printed form which stated, among other things, that the stock had been deposited as security for the debt, and that on default the bank was authorized to sell without advertisement, and to become the purchaser. The debtor having made default, the Bank of Forsyth advertised the stock for sale, and at the time and place of the sale the Bank of Culloden caused notice to be given of the existence of the by-law, and of the fact that the Allen Merchandise Company was still indebted to it. The sale proceeded, and the Bank of Forsyth bought. It presented the scrip and evidence of the purchase to the Bank of Culloden, and demanded a transfer on the books of the bank, and a new certificate, which the Bank of Culloden refused on the ground of "its prior lien on said stock." The Bank of Forsyth thereupon brought suit against the Bank of Culloden for the value of the stock. On the foregoing facts, which were submitted to the judge of the city court of Forsyth without a jury, he rendered a ⁵⁷⁷ judgment in favor of the plaintiff, for the market price of the stock, six hundred and sixty dollars. The Bank of Culloden excepted. It contended that the stock was not negotiable; that there was an imperfect transfer; that the Bank of Forsyth acquired no interest and no power to sell; that such transfer as was made was inferior to the charter and by-law lien, and that the title acquired at the sale was likewise inferior to the lien of the Bank of Culloden; and that in any event the Bank of Forsyth could only recover the amount of its debt, five hundred and forty dollars, and not the market value of the stock.

The Bank of Culloden was incorporated under the Civil Code, section 1903, and not under the act of 1891: Acts 1890-91, p. 172. It cannot, therefore, claim a charter lien by virtue of the amending act approved December 20, 1893 (Acts 1893, p. 78). Its defense to the present suit must rest solely upon the by-law lien, under the Civil Code, section 2825. If the face of the scrip had indicated the existence of such lien, every purchaser or pledgee would thereby have been put on in-

quiry, and would have taken subject to the claim of the bank for any debt due at the date of the transfer, and subject to any debt that might arise between the holder of the stock and the bank before the latter received notice of a sale or a pledge. But the same reasons which protect bona fide purchasers against secret liens generally apply with peculiar force to prevent the enforcement of secret encumbrances or corporate shares. For while they are not negotiable in the full sense, yet the custom of business, the necessities of commerce, and the multitude of transactions tend more and more to force the transfer of stock under the rule applicable to the sale of negotiable instruments. Indeed, the Civil Code, section 2825, recognizes that the by-law lien would not be good as against a creditor without notice. It being admitted that the Bank of Forsyth in the present case was an innocent pledgee, on that branch of the case it must prevail, unless, as claimed by the plaintiff in error, the words "transferable only on the books of the corporation, in person or by attorney, on surrender of the certificate," charged the pledgee with notice of what could be learned by examining the books, including the by-law, and the amount of ⁵⁷⁸ the bank's claim against the Allen Merchandise Company. Exactly the contrary was true. The notice, instead of operating only as a warning of the company's rules, was also a promise that the bank would not make a transfer to anyone who did not produce and surrender the scrip itself: *Bank v. Lanier*, 11 Wall. 378, 20 L. ed. 172. When, therefore, the pledgee received the certificate, it took that which the Bank of Culloden recognized as the main muniment of title. And while, for the purpose of sending notices of meetings, paying dividends, voting and the like, the transfer on the books was important between the bank and the stockholders, yet, as between the buyer and the seller, the title could pass and the transfer be otherwise completed: Civ. Code, sec. 1855. In some jurisdictions the title may pass upon the payment of the purchase money and the delivery of the certificate, without any written assignment; in others, by the delivery of the certificate with an assignment thereof on the same or on a separate paper. Here there was a delivery, an assignment by the very terms of the note secured by the stock, and a power of attorney therein to make sale on default. This was sufficient between the borrower and the lender; and after default and a sale under the power, the purchaser was entitled to a transfer on the books, and a new certificate. Had the pledgee demanded a transfer before the sale, the measure of

damages for a failure to comply would have been his debt and interest. But at the sale it acquired the pledgor's title free from any equity of redemption, and the measure of damages for the refusal to make the transfer was the value of the shares at the time of the refusal: 3 Clark and Marshall on Private Corporations, secs. 582, 602, 603b.

Judgment affirmed.

All the justices concur.

On the Negotiability of certificates of stock, see Shattuck v. American Cement Co., 205 Pa. St. 197, 54 Atl. 785, 97 Am. St. Rep. 735, and cases cited in the cross-reference note thereto; O'Herron v. Gray, 168 Mass. 573, 60 Am. St. Rep. 411, 47 N. E. 429, 40 L. R. A. 498.

On the Essentials of a Transfer of Stock, see Sparks v. Hurley, 208 Pa. St. 166, 101 Am. St. Rep. 926, 57 Atl. 364. As to the necessity of an indorsement of the shares, see First Nat. Bank v. Holland, 99 Va. 495, 86 Am. St. Rep. 898, 39 S. E. 126, 55 L. R. A. 155; and as to the necessity of a transfer on the books of the corporation, see Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639; McClung v. Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890; People's Bank v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; First Nat. Bank v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, and cases cited in the cross-reference note thereto; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; In re Argus Printing Co., 1 N. Dak. 435, 26 Am. St. Rep. 639, 48 N. W. 347, 12 L. R. A. 781. On the liability of a corporation for refusing to make a transfer and issue a new certificate, see Craig v. Hesperia Land etc. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10, 35 L. R. A. 306; Rice v. Rockefeller, 134 N. Y. 174, 30 Am. St. Rep. 658, 31 N. E. 907, 17 L. R. A. 237; Tregear v. Etiwanda Water Co., 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

DAVIS v. BOYETT.

[120 Ga. 649, 48 S. E. 185.]

STATUTE OF LIMITATIONS.—A Defendant may Avail Himself of the defense of the statute of limitations at the trial term, by a motion to dismiss a petition which shows on its face that the cause of action is barred. (p. 119.)

STATUTE OF LIMITATIONS.—Mere Ignorance of the existence of facts constituting a cause of action does not prevent the running of the statute of limitations. (p. 120.)

SEDUCTION—Limitation of Actions.—A Father's cause of action for the seduction of his daughter arises when the act of seduction is complete, and not when he discovers that she has been seduced. (p. 123.)

Hendricks & Harrison and H. B. Peebles, for the plaintiff.

Alexander & Gary and Buie & Knight, for the defendant.

550 FISH, P. J. On September 24, 1901, the plaintiff brought an action for the seduction of his minor daughter, against the defendant. From the allegations of the original petition, it appeared that the seduction occurred either upon the second day of June, 1899, or within one week from that date. At the trial term, the defendant moved to dismiss the suit, upon the ground that the petition showed that it was barred by the statute of limitations. Pending this motion, the plaintiff, with leave of the court, amended his petition by alleging that "the act of seduction committed on the second day of June, 1899, did not come to his knowledge, and that he was ~~was~~ injured and damaged by said act as set forth in his petition. ~~un~~til the fifteenth day of April, 1900." The defendant renewed the motion to dismiss, upon the ground that the petition, as amended, still showed upon its face that the suit was barred by the statute. The court sustained the motion and dismissed the suit, and the plaintiff excepted.

1. It is contended here that even if the petition showed that the action was barred by the statute of limitations, the suit could not, at the trial term, be dismissed upon mere motion for this reason. It does not appear from the bill of exceptions that this point was raised in the court below. Besides, the question has been decided by this court adversely to the contention of the plaintiff in error: *Cleveland v. Walden*, 62 Ga. 163.

551 2. "An action by a father to recover damages for the seduction of his daughter is barred by the statute of limitations, unless brought within two years from the time the right of action accrued": *Hutcherson v. Durden*, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811. It appeared from the petition that more than two years had elapsed after the time when the seduction was alleged to have been accomplished before the action was instituted; therefore, if the right of action accrued when the seduction took place, the bar of the statute had attached, unless the plaintiff was debarred or deterred from bringing his action by fraud on the part of the defendant. The plaintiff did not allege that he was debarred or deterred by the defendant from instituting his suit within the statutory period. He rested his case, so far as the statute of limitations was concerned, squarely upon the proposition that the statute of limi-

tations would not begin to run until he had knowledge of the seduction; and that no cause of action arose in his favor until then. The principle that mere ignorance of the existence of the facts constituting a cause of action does not prevent the running of the statute of limitations is one of general recognition: *Crawford v. Gaulden*, 33 Ga. 173; *Fee v. Fee*, 10 Ohio St. 469, 36 Am. Dec. 103; *Granger v. George*, 5 Barn. & C. 149; *Means v. Jenkins*, 18 Ill. App. 41; *Smith v. Bishop*, 9 Vt. 110, 31 Am. Dec. 607; *Thomas v. White*, 3 Litt. 177, 14 Am. Dec. 56; *Thrower v. Cureton*, 4 Strob. Eq. 155, 53 Am. Dec. 660; *Hoffman v. Parry*, 23 Mo. App. 20; *State v. Schaeffer*, 12 Mo. App. 277; *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Shreves v. Leonard*, 56 Iowa, 74, 8 N. W. 749; *Miller v. Lesser*, 71 Iowa, 147, 32 N. W. 250; *Conner v. Goodman*, 104 Ill. 365; *Lexington Life Ins. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 165; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807.

3. But it is contended that the cause of action in the present case did not arise until knowledge of his daughter's seduction was brought home to the father. Counsel for the plaintiff in error argue, with some plausibility, that, under the laws of this state, "the real gravamen of the action is the shame, mortification, humiliation and sense of family dishonor and disgrace from which the plaintiff suffers," and that as he does not suffer from such feelings so long as he is in blissful ignorance of his daughter's loss of virtue, he has no cause of action until he discovers that she has been seduced. This makes the discovery of the seduction, and not the seduction itself, the cause of action. We cannot ⁶⁵² agree with this reasoning. The father's right of action did not depend upon his knowledge of the great wrong which had been done him by the defendant. He had a right of action before he discovered the facts out of which it arose. Moreover, the harrowing feelings produced by his realization of the awful truth were not the only injury which he sustained from the ruthless invasion of the sanctity and purity of his home circle. It appeared from his petition that his family consisted of his wife, himself and other children besides this fifteen year old daughter; and the corruption of the morals and destruction of the virtue of this young member of his household, with whom he, his wife, and other children lived in daily and intimate association, was obliged to be a most grievous and irreparable injury to him, irrespective of his knowledge of her seduction. Our Civil Code provides that, in suits of this character; the seduction is the gist of the action, and no loss

of services need be alleged or proved: Civ. Code, sec. 3870. So, when the seduction was accomplished the right to bring an action therefor accrued. It is well established that where the suit is for the seduction, and not for loss of services and expenses incurred in consequence of the seduction, the statute of limitations begins to run from the act of seduction. But the courts have differed as to when the statute begins to run in cases where the loss of services is made the gravamen of the action. It was held in a Virginia case, that where the only change in the common law made by the statute in reference to actions for seduction is to dispense with allegation and proof of loss of services, the plaintiff may still bring his action as at common law, making the loss of services the gravamen of the complaint, and if he does so, the limitation is from the loss of service, and not from the act of seduction: *Clem v. Holmes*, 33 Gratt. 722, 36 Am. Rep. 793. The supreme court of West Virginia even held that although the statute of that state dispensed with the necessity of alleging and proving loss of services, no other change was thereby made in the common law governing the action; and that it was still necessary to allege that the relation of master and servant existed between the plaintiff and his daughter, and, therefore, the father's right of action did not accrue until he lost or was deprived of the service of his daughter: *Riddle v. McGinnis*, 22 W. Va. 253. It was held in Kentucky that the statute of that state, interpreted to authorize a father to maintain ⁶⁵³ an action for the seduction of his daughter, without either proof or allegation of loss of service, was only a cumulative remedy, and that an action could still be maintained for the loss of service only, and, in such a case, the statute of limitations did not begin to run until the loss accrued. But the judge delivering the opinion said that in an action for seduction the limitation begins to run from the act of seduction: *Hancock v. Wilhoite*, 62 Ky. (1 Duv.) 313. Later, when this same case was again before the court, the same ruling was made; and it was also then held that when the action was brought for the loss of services and expenses consequent upon the seduction, the father had the right also to recover for the injury to his feelings and his family's dishonor, although the suit was not brought until the period within which an action for the seduction alone could be brought had expired: *Wilhoite v. Hancock*, 68 Ky. (5 Bush) 567. On the other hand, in *McKay v. Burley*, 18 U. C. Q. B. 251, it was held that in an action by a brother for the seduction of his sister, where the

principles of the common law were not interfered with by the statute applicable to a suit by a parent, and the evidence must establish the relation of master and servant, the statute of limitations began to run from the time of the seduction, and not from the birth of the child. Robinson, C. J., said: "We take it to be undeniable that the statute of limitations began to run from the time of the seduction; for the plaintiff could then have brought his action, and need not have waited until the child was born." So, the supreme court of Pennsylvania held: "Because, in trespass by a father for the seduction of his daughter, the cause of action is the seduction, and not the resulting lying-in expenses and support of the daughter, and the mental pain she may have sustained, the action is barred when six years [the statutory period] have elapsed after the seduction was accomplished": *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. 819. In that case Mr. Justice Mitchell, after citing and quoting from other authorities, said: "But a case which seems to put the matter beyond further contention is *Logan v. Murray*, 6 Serg. & R. 175, 9 Am. Dec. 422. There the daughter was seduced during her father's lifetime, but was not confined until after his death, while living with and rendering service to her mother who was at the expense of the confinement. It was held that an action by the mother could not be maintained. 'Whatever ⁶⁵⁴ damage the mother might sustain,' said Duncan, J., 'arose from an act committed in the father's lifetime. The daughter was his servant. When the mother became, on her husband's death, the mistress of the house, the mischief was done; the daughter came into her service pregnant. If the alleged trespass gave her no cause of action, the consequence of the trespass could not.' This case is decisive that the cause of action is the seduction, and that no new cause of action arises from the subsequent results to the plaintiff." This conclusion was reached although there does not appear to have been any statute in Pennsylvania dispensing with allegation and proof of loss of service.

Some courts, while recognizing the rule that the limitation of the statute begins to run against an action for seduction from the time of the seduction, have held that seduction may be a continuous act, which is not completed with the first sexual intercourse, and that, in such a case, the statute will begin to run from the last, and not the first, act of sexual intercourse. This is the rule now established in Tennessee, although the supreme court of that state first held to the contrary. In

Franklin v. McCorkle, 16 Lea, 609, 57 Am. Rep. 244, it was held that, in an action for seduction, "the offense is complete and the cause of action accrues and the statute becomes operative thereon with the first act of sexual intercourse." Later, however, this case was overruled (one judge dissenting), and it was held that, in an action for seduction, "the averments that the acts constituting the wrong complained of were committed under a promise of marriage, and that such promise was continued and renewed from time to time to a period less than twelve months [the statutory limitation] before the bringing of the suit, saves the bar" of the statute: *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473. This last case was approved and followed in *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341, where it was held: "The statute of limitations does not begin to run against the right to maintain an action for seduction under promise of marriage, so long as the man, by continuous acts, promises, and artifices, keeps up the illicit intercourse, as seduction is in such case a continuous act." So, in Indiana, it has been held that: "When successive acts of intercourse are shown to have occurred under an engagement to marry, they may be regarded as constituting one wrong, consummated in the last act": *Haymond v. Saucer*, 84 Ind. 4. It will be seen ~~ess~~ that none of these various cases, however much they may differ with each other in other respects, conflict with the rule that when the suit is primarily for the seduction, and not for loss of service, the statute of limitations begins to run when the act of seduction is complete. In the case with which we are dealing it is distinctly alleged, by the amendment to the petition, that the act of seduction was committed on the second day of June, 1899; and were it otherwise, we do not think we would feel disposed to follow the courts of Tennessee and Indiana in holding that the act of seduction may be continued after the female seduced has lost her virtue. We apprehend that it would be very difficult to apply such a principle to a criminal case in which the statute of limitations was pleaded to an indictment for seduction, so as to avoid the bar of the statute, upon the ground that the act of seduction had been continuously performed for a considerable length of time after the first act of sexual intercourse between the accused and his alleged victim. As our Civil Code provides that seduction is the gist of the action, gives a right of action whether it is followed by pregnancy or not, provides that the mother may bring the action if the father refuses to sue, and that no loss of service

need be alleged or proved, it would seem that in any suit for damages consequent upon the seduction of a daughter the cause of action would accrue when the act of seduction was accomplished. But whether the old common-law action still survives in this state, or is superseded by the action for which our statute provides, it is apparent, we think, in the present case that the action was for the seduction, and not for loss of service consequent thereon. This being true, it is clear that the cause of action was barred by the statute of limitations, as more than two years had elapsed after the right of action accrued before the suit was instituted. Taking the allegations of the petition to be true, the case made by the plaintiff appeals very strongly to our sympathies and to our sense of right and justice; but the rule is well, and we think rightly, established that courts cannot make exceptions to the statute of limitations, in favor of particular persons or special cases, or to meet the hardships resulting from its application to the facts of a given case. Besides, the plaintiff, according to his own showing, had more than thirteen months in which to bring his suit, after he discovered that his daughter had been ⁶⁵⁰ seduced by the defendant, which is longer than the time limited in some of our sister states in which to bring a suit of this character.

Judgment affirmed.

All the justices concur.

The Statute of Limitations is not ordinarily prevented from running by the ignorance of the plaintiff of his right to bring suit: *State v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244, 66 N. E. 182; monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 515, 516.

On What Constitutes Seduction and actions therefor, see the monographic notes to *Weaver v. Bachert*, 44 Am. Dec. 162, 179; *Bradshaw v. Jones*, 76 Am. St. Rep. 659-682.

PRESTON v. GARRARD.

[120 Ga. 689, 48 S. E. 118.]

PARTNERSHIP—Retiring Partner a Surety as Between the Partners.—When one partner retires from a firm, and the continuing partner agrees to assume the firm debts, the retiring partner, as between himself and his copartner, becomes merely a surety for the continuing partner upon the debts of the firm. (p. 124.)

PARTNERSHIP—Retiring Partner a Surety as to Creditors.—

Mere notice to a creditor of the retirement of one partner, and of an agreement by the continuing partner to assume the firm debts, requires him to treat the retiring partner as a surety for the continuing partner; and if he extends the time of payment of his debt without the retiring partner's knowledge, the latter is released. The notice, however, must be actual. (p. 123.)

Turner & Adams, for the plaintiff in error.

COBB, J. It is well settled that where a partnership is dissolved by the retirement of one of the members, and the continuing partner assumes the payment of the debts of the firm, the retiring partner, as between himself and his copartner, is no longer a principal debtor, but merely a surety for the latter upon the debts of the firm: See 22 Am. & Eng. Ency. of Law, 2d ed., 185; Shumaker on Partnership, 342; 1 Bates on Partnership, sec. 532. Some disagreement among the courts has arisen in fixing the rights of creditors after dissolution by the retirement of one member and the assumption of the debts by the other. Of course, if a creditor is a party to the agreement made between the partners, he will be bound by it, and must deal with the retiring partner as a surety. All are agreed as to this. The difficulty has arisen in determining whether mere knowledge by the creditor of the dissolution and of the agreement of the partners would require him to deal thereafter with the retiring partner as a surety, with reference to past transactions of the firm. In the case of *Oakeley v. Pasheller*, 4 Clark & F. 207, decided in 1836, the house of lords was supposed to have held that mere knowledge of these things by the creditor would require him to treat the retiring partner as a surety, and that if he extended the time of payment of this debt, without the retiring partner's knowledge or consent, he would be released. But in the case of *Swire v. Redman*, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the house of lords did not in *Oakeley v. Pasheller*, 4 Clark & F. 207, intend to rule as was supposed, but intended merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners. Some American courts have followed what was supposed to be the ruling in *Oakeley v. Pasheller*, 4 Clark & F. 207, and others have adopted the decision in *Swire v. Redman*, L. R. 1 Q. B. 536, which was to the effect that something more than mere knowledge on the part of the creditor is required—that he must expressly consent to the arrangement between the partners be-

fore he will be bound by it, and that in the absence of such consent he can deal with the retiring partner as a principal debtor and as an active partner so far as past transactions are concerned. Cases like *Swire v. Redman*, L. R. 1 Q. B. 536, proceed on the theory that when a creditor's rights once become fixed by contract, no agreement on the part of the other parties to the contract can affect those rights or change their relation to the creditor so far as he is concerned; that it is wholly immaterial that the creditor was informed of such an agreement; that the partnership still continues relatively to his debt; and that any arrangement which he makes with the continuing partner in behalf of the partnership will be binding on the other.

In the other line of decisions it is held that whenever the relationship of principal and surety arises between partners after dissolution and the assumption by one partner of the debts of the firm, everyone having notice of the dissolution and the agreement between them is bound to take notice of the relationship which the law creates, and to act accordingly; that while a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as his debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and the agreement, does anything which would ^{and} release an ordinary surety, the retiring partner will be entirely released from his obligation; that this is no hardship on the creditor, because he can protect himself by granting no indulgence to the continuing partner, who has become alone the principal debtor, or doing nothing without the retiring partner's consent which would affect the status of the claim to the prejudice of the surety partner. The following are some of the decisions dealing with the subject: *Rawson v. Taylor*, 30 Ohio St. 389, 27 Am. Rep. 464; *Gates v. Hughes*, 44 Wis. 332; *Mildred v. Thorn*, 56 N. Y. 402; *Ridgley v. Robertson*, 67 Mo. App. 45; *Barber v. Gilson*, 18 Nev. 89, 1 Pac. 452; *Maier v. Canavan*, 8 Daly, 272; *Johnson v. Young*, 20 W. Va. 614; *Williams v. Boyd*, 75 Ind. 286; *Leithauser v. Baumeister*, 47 Minn. 151, 28 Am. St. Rep. 336, 49 N. W. 660; *Whittier v. Gould*, 8 Warts. 485; *Wilds v. Jenkins*, 4 Paige, 481; *Thurber v. Corbin*, 51 Barb. 215; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529; *National Cash Register Co. v. Brown*, 19 Mont. 200, 61 Am. St. Rep. 498, 47 Pac. 995, 37 L. R. A. 515. Strong arguments can be made in support of either view of this question, and we

would experience some difficulty in determining on principle what the rule ought to be. Previous decisions of this court have, however, settled that the rule to be followed in this state is the one supposed to have been announced in *Oakeley v. Pasheller*, 4 Clark & F. 207. The earliest case on the subject is that of *Stone v. Chamberlin*, 20 Ga. 259. It was there held that where a creditor of a partnership, with knowledge that it had been dissolved by the retirement of one of the members, took a note in renewal of another given by the firm before the dissolution, and extended the time of payment of the original indebtedness, without the knowledge or consent of the retiring partner, he would be discharged. There was nothing to show that the renewal note was expressly taken in settlement of the old indebtedness: See, in this connection, *Phillips v. Nash*, 47 Ga. 229 (6); *Venable v. Stevens*, 94 Ga. 281, 21 S. E. 516; *First Nat. Bank v. Cody*, 93 Ga. 148, 19 S. E. 831. The only effect of the new note, therefore, so far as the retiring partner was concerned, was to extend the time of payment of the old indebtedness; and this extension operated as a release of the retiring partner. While the word "surety" is not used in the opinion, the decision was evidently based on the theory that the retiring partner was a surety, and, as such, released by the extension. This came out more clearly when the case was again before this court: *Chamberlin v. Stone*, 24 Ga. 310. There Judge Benning said: "The taking ⁰⁹³ of the new note by the plaintiff was, at least, a suspension of their right to demand payment of the debt until the new note fell due; and therefore the effect was to put the debt in such a condition that Stone would no longer have the right to pay it up immediately, and demand contribution from Johnson, but would have to wait till the note fell due, before he could pay it up and demand contribution." To the same effect see *Louderback v. Lilly*, 75 Ga. 855; *Silas v. Adams*, 92 Ga. 350 (2), 17 S. E. 280. See, also, *First Nat. Bank v. Cody*, 93 Ga. 128 (6), 148, 19 S. E. 831. The code provides that after dissolution a partner has no power to renew or continue an existing liability of the partnership: Civ. Code, sec. 2659. It was accordingly held in *First Nat. Bank v. Ells*, 68 Ga. 192, that where a creditor, with knowledge of the dissolution, allowed one of the partners to make a payment on a draft which had been accepted by the firm, and substitute a new draft in its place without the knowledge of the other partner, the latter was released: See, also, *Hughes v. Treadaway*, 116 Ga. 669, 42 S. E. 1035. Under

these decisions, mere notice of the dissolution and of the agreement between the partners that the continuing partner was to assume the payment of the firm debts prevented the plaintiff in this case from extending the time of payment of the original indebtedness, without the knowledge or consent of the defendant Preston. Notice to the creditor must, however, be actual: See *Richards v. Butler*, 65 Ga. 593. The extension of the time of payment, under the circumstances alleged in the plea, had the effect of releasing the defendant; and the court erred in striking the plea.

Judgment reversed.

All the justices concur.

For Authorities upon the question involved in the principal case, see *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411; *National Gas Register Co. v. Brown*, 19 Mont. 200, 61 Am. St. Rep. 498, 47 Pac. 995, 37 L. R. A. 515.

ROBERSON v. THE DOWNING COMPANY.

[120 Ga. 833, 48 S. E. 429.]

REGISTRATION OF DEED—Error in Initials of Name.—A deed executed in the presence of "F. H. Harris," notary public, but registered as executed in the presence of "T. H. Harris," notary public, imparts constructive notice. (p. 131.)

ADVERSE POSSESSION—Tacking—Unrecorded Deed.—The possession of a grantee who fails to record his deed may, to make out prescription, be tacked to the possession of his grantor, whose deed was recorded. (p. 132.)

ADVERSE POSSESSION—Constructive Possession.—Registration of the color of title is not necessary to make possession of a part extend to the limits of a lot or known tract described in the color. (p. 137.)

John W. Bennett, Leon A. Wilson and W. M. Toomer, for Roberson.

W. E. Kay and C. P. Goodyear, for The Downing Company.

834 LAMAR, J. The Downing Company filed an equitable petition against Roberson, to quiet the title to lot 88 in the second district of Wayne county, and to enjoin acts of trespass. The defendants claimed under paper title, having entered there-

under on a part of the land, shortly before the suit was filed. The plaintiff also claimed under a paper title, one link of which was a deed from Lewis, deputy sheriff, under a sale by virtue of a tax fieri facias for three dollars and seventy cents against W. B. Parker, to Mumford, recorded in 1863. Mumford did not enter, and it was claimed that the deed was void, because, at the time it was made, a sheriff had no right to make a sale under such a tax fieri facias. Mumford conveyed the land to Burbage in 1880, but the deed was not recorded until 1902. Subsequent conveyances of the same land were as follows: Burbage to Armitage, March 11, 1881, recorded March 14, 1881; Armitage to McDonough, February 21, 1882, recorded February 28, 1882; McDonough to Burbage, January 25, 1887, recorded in 1902. Burbage executed a mortgage on the land to the Downing Company, with power of sale, May 29, 1893, recorded May 30, 1893. There was a sale under this power, November 6, 1895, to the Downing Company; and the deed made in pursuance of the sale was recorded November 8, 1895. A confirmation and quitclaim to the company was executed by Burbage, April 14, 1902, and recorded April 16, 1902. The suit was filed April 19, 1902. The defendants contended that the evidence of possession was not sufficient to make the title ripen to the whole lot; that the deed from Burbage to Armitage was not duly recorded, the deed having been executed in the presence of F. H. Harris, notary public, and registered as executed in the presence of "T. H. Harris," notary public and there being no such officer as T. H. Harris, notary public, in Glynn county, where the deed purported to have been executed. W. E. Kay, Esq., testified that he was present and saw the deed executed, and that it was attested by F. H. Harris, notary public of Glynn county. There was evidence as to boxing the timber, running a turpentine still, sawmills, and the like, on the land in ³³⁵ question, from 1881 down to the date of the alleged trespass; also that Mrs. Lary, the wife of one of Burbage's partners who at one time had an interest as such in the land, had been in possession of a part of it for seventeen years under the same chain of title; that she had been living on the property for sixteen years—ever since 1887. The verdict having been for the defendant, the plaintiff moved for a new trial on the general grounds, and because the court admitted in evidence a certified copy of the decree in the case of Parker *v.* Green, without requiring a copy of the entire record in that cause; because the court admitted in evidence a certified copy of the will of W. W.

Parker, with a certificate of the ordinary that McIntosh had qualified as executor, without requiring the production of the letters testamentary; and because the court charged the jury that possession under a duly recorded deed will be construed to extend to all the contiguous property embraced therein, the error in the charge being that this principle applies only where there is a conveyance of two or more contiguous lots, and not to a case like this, where there was only one lot, and where, if the evidence did not establish possession of the whole under color of title for seven years, there was uncontradicted evidence of possession of a part for that period. It was contended that the court should have charged that possession of a part for seven years under color of title gives prescription to the entire lot, whether the deed has been recorded or not.

The court granted a new trial, for the reason that he considered the verdict to be contrary to the following charge: "It would not be necessary that the plaintiff or any of its predecessors in title should continuously and for a period of seven years hold possession of the premises in order to give them such prescriptive title; but it would be sufficient if you should find from the evidence that any of the predecessors in title of the plaintiff had possession of the premises for a part of such period of seven years, and then transferred his title to either the plaintiff or [one] of its predecessors in title, who immediately went into possession of such premises and held the same until such period was completed. In other words the possession of each of the predecessors in title of the plaintiff would be tacked onto the possession of the others, until possession for seven years would be held and the prescription thus ripened, provided such possession was uninterrupted and ^{§36} continuous and under the same claim of title; and if you should find from the evidence that such prescription had ripened either in the plaintiff or any of its predecessors in title, then such prescriptive title would be perfect title, and paramount to the perfect paper title, if you should find such to exist." The defendant filed a bill of exceptions complaining of the grant of a new trial. The plaintiff filed a cross-bill of exceptions, on the ground that the court should have granted a new trial upon each and every ground in the motion, and should not have restricted the grant to the specific ground set out in the order.

1. The deed from Burbage to Armitage, dated March 11, 1881, was witnessed by John H. McCollough and F. H. Harris, notary public. It was recorded March 14, 1881, but the clerk

erroneously entered the name of the notary public as T. H. Harris. The defendants therefore insist that the possession thereunder by Armitage, and thereafter by McDonough and Mrs. Lary, was not possession under a duly recorded deed, and hence there could be no constructive possession of the entire tract described in the color: Civ. Code, sec. 3786. But bad writing by the notary, incorrect reading by the clerk, or his errors in transcribing the original, will not destroy the registration as constructive notice, if the errors are immaterial, or of a character which will not mislead one entitled to notice, when he examines the record actually made. If the property be misdescribed, or if the names of the parties to the instrument be so entered as to deceive an innocent purchaser, or fail to give substantial notice to one entitled thereto, a different question might be presented. In many cases there are, no doubt, slight inaccuracies in transcribing the paper upon the deed-book. It will be rare where in spelling, punctuation, or the like there is not some slight variation from the original. An error in a formal part of the instrument would not concern those not interested therein, nor have the effect of nullifying the notice given by the substantial correctness of the registration of the material parts of the paper. To one examining the books in the clerk's office, this deed would appear on its face ⁸³⁷ to have been duly recorded. The defendant's evidence showed that it was actually executed in the presence of an officer and was entitled to record. The mistake in substituting the initial "T" for "F" was not of a character to throw an examiner off his guard. The names of the grantor and grantee, the description of the property, and the fact that the land had been sold in fee, were clearly and correctly indicated, and were sufficient to put the true owner on notice that such an instrument had been executed in the presence of an officer authorized to attest deeds, and that the occupant under such instrument claimed or might be claiming constructive possession of all the property therein described: Woodson v. Allen, 54 Tex. 551. In Shepherd v. Burkhalter, 13 Ga. 443 (5), 58 Am. Dec. 523, the entire signature of the mortgagor was omitted from the record, and in Williams v. Adams, 43 Ga. 410, the signature of the attesting officer was entirely omitted on the deed-book. These omissions were substantial. On the face of the record such papers were either incomplete or not entitled to record, and therefore gave no notice. But in Hadden v. Larned, 87 Ga. 639, 13 S. E. 806, where the paper had been executed out of

the state in the presence of a commissioner, and the clerk failed to transcribe the seal of such commissioner, it was held that while the record should have indicated that a seal had been used, its failure so to do did not vitiate the registration. "To pronounce the recording fatally defective for so slight a blemish would be over-technical": See *Way v. Lowery*, 72 Ga. 65, and *Johnson v. Duncan*, 90 Ga. 1, 16 S. E. 88, where there was a mistake in the number of the lot. See, also, *Smith v. Meador*, 74 Ga. 416, 58 Am. Rep. 438, where the officer was only such *de facto*; *Banks v. Lee*, 73 Ga. 26; *Burke v. Anderson*, 40 Ga. 535; *St. Croix Co. v. Ritchie*, 73 Wis. 409, 41 N. W. 345, 1064; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; dissenting opinion in *Jennings v. Wood*, 20 Ohio, 279 (Lemuel for Samuel); *Royster v. Lane*, 118 N. C. 156, 24 S. E. 796 (mistake of the name in the granting clause).

2. If, then, this deed from Burbage to Armitage was duly recorded, and there was continuous and adverse possession of any part of the land thereunder for seven years, plaintiff would have been entitled to a verdict, even under *Knight v. Isom*, 113 Ga. 617, 39 S. E. 103; and the judge rightly granted a new trial, unless the defendant's contention be correct, that, under the Civil Code, section 3587, there could be no tacking when the subsequent conveyances were ~~not~~ not immediately and duly recorded and followed by continuous possession thereunder by the subsequent grantee. Such seems to be the ruling in Texas, but the decisions are based upon the statutes of that state, which fix one period for prescription without color, another for prescription under color, and a still shorter period under recorded color. The Civil Code, section 3587, is not to be construed as modifying, but as in *pari materia* with section 3598, that: "An inchoate prescriptive title may be transferred by a possessor to a successor, so that the successive possessions may be tacked to make out the prescription." If A enters under color duly recorded, and dies, the possession of his heirs is but a continuation of A's possession. Or if A should lease such property, his possession would be continued by the tenant although the lease may not have been recorded. If, on the other hand, he sells, the purchaser is in privity with him, and the effect of the entry under the sale is to maintain and continue such original possession, or at least to afford a foundation on which the new possession can be tacked. A similar question was decided in *Dolton v. Cain*, 14 Wall. 472, 20 L. ed. 830, under the Illinois statute, that one "having a connected title in law or equity dedu-

cible of record from the state or the United States can plead the possession in bar of the suit." It was there held not to be necessary that the entire title of the defendant be evidenced by actual record. If the source of the title is of record, it is available to every person claiming a right under it who can connect himself with it.

3-5. The court therefore properly granted a new trial. The case might here be left but for the fact that the defendants in error, who were plaintiffs in the court below, filed a cross-bill of exceptions, and assigned error on that part of the charge in which the court instructed the jury that "possession under a duly recorded deed will be construed to extend to all the contiguous property embraced therein; that is, if a person is in actual possession of a part of a lot of land under a duly recorded deed conveying the whole of the lot of land to him, or more of the lot than he is in actual possession of, has inclosures upon such part of lot under fence, houses built upon it, or other evidence of actual possession as I have charged you, and has his deed duly recorded under this section of the code, he will be construed to have in his possession all of the land embraced within the boundaries set out in his ⁸³⁹ deed." In the argument on this and similar assignments, the defendant in error asked and obtained permission to review *Knight v. Isom*, 113 Ga. 617, 39 S. E. 103, a decision by six justices, and *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436, by five justices. The briefs and discussion were directed solely to this motion.

All of the courts in this country recognize the same rule on the subject of constructive possession as that laid down in the Civil Code, section 3586, but there is much difference as to the incidents and circumstances under which it will be applied. As said in *Woods v. Montevallo Co.*, 84 Ala. 560, 5 Am. St. Rep. 393, 3 South. 475: "How far color of title to the land, accompanied by actual occupancy of a part, will extend the occupant's possession constructively to the whole tract included in the deed, is not definitely settled, and, we may add, is a subject full of difficulty." Possession of a comparatively small part has been decided not to be constructive possession of a tract consisting of four thousand acres, twenty thousand acres, or forty-eight thousand acres: *Jackson v. Woodruff*, 1 Cow. 276, 13 Am. Dec. 525; *Thompson v. Burhans*, 61 N. Y. 52; *Chandler v. Spear*, 22 Vt. 405; *Polk v. Beaumont etc. Co.*, 26 Tex. Civ. App. 242, 64 S. W. 58. In *Archibald v. New York Cent. etc. R. R. Co.* (1896), 1 App. Div. 255, 37 N. Y. Supp. 366, it ap-

peared that the New York Central Railroad Company had a grant to a strip of land extending one hundred and forty miles from New York City to Albany, and adjoining its track. It built a station on the strip at Yonkers, and contended that possession of a part under color gave it constructive possession of the balance; but of course the court refused to sustain this contention. Some courts hold that there can be no such thing as constructive adverse possession; others that constructive possession cannot defeat the constructive possession of the absent owner; others that it is effective only when the tract consists of a known farm with well-defined boundaries; others that the unoccupied portion must be subservient to and capable of a use and be actually used in connection with that held possessio pedis; as by the grazing of stock, cutting of firewood or hay, or some act to indicate the assertion of title, even though by themselves such acts were insufficient to establish independent adverse possession; others hold that it does not apply where the occupation is of a small part of a large tract: *Turner v. Stephenson*, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277; *Foulke v. Bond*, 41 N. J. L. 550; *Thompson v. Burhans*, 61 N. Y. 52; *Jackson v. Woodruff*, 1 Cow. 276, 13 Am. Dec. 525; *Northport v. Hendrickson*, 139 N. Y. 440, 34 N. E. 1057; *Murphy* ⁸⁴⁰ *v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Chandler v. Spear*, 22 Vt. 405. And this court has likewise recognized that possession of a part does not necessarily extend to the limits described in the color; as, for example, where the inclosure was of a small part of a field which took in a portion of three tracts cornering therein: *Denham v. Holeman*, 26 Ga. 183, 191, 71 Am. Dec. 198. And in *Carrol v. Gillion*, 33 Ga. 547, the owner of property bought adjoining land at a tax sale, cut timber and rails therefrom, extended the inclosure over the land, and took in a strip across the whole length of the property bought at tax sale, and continued to cultivate and occupy this strip for more than seven years; yet it was held that such possession did not give him title to the limits in the color. Not only have modifications and limitations like these been indicated, but some courts have gone further, and, for the reasons stated in *Anderson v. Dodd*, 65 Ga. 404 (bot.), held that not only must there be possession of a part and color, but that the color should be recorded, in order for the prescription to ripen over that part of the land held only in constructive possession.

"While a person entering upon lands adversely, without any deed or color of title, is thus restricted to the land actually

occupied by him, and takes nothing beyond the limits of his actual occupancy, and is required to occupy the land for the purposes of improvement or cultivation, yet where a person goes into possession under color of title, duly recorded, in which the boundaries of the lot are defined, this operates as constructive notice to all the world of his claim, and also of its extent, so that not only does a sufficient occupancy of a part in the lot carry with it, by construction, the possession of the entire premises described by his conveyance, where the boundaries are well defined, but also dispenses with the rule as to *pedis possessio*, and only requires from him such an occupancy as the nature and character of the premises admits of": Wood on Limitations, 3d ed., sec. 259. In *Prescott v. Nevers*, 4 Mason, 330, Fed. Cas. No. 11,390, a suit for cutting timber off of lot No. 1, where one of the parties claimed title by virtue of possession of a part, and constructive possession of the balance of the lot, Judge Story said: "I take the principle of law to be clear, that where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed ⁸⁴¹ to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described, in any other person." In *Gardner v. Gooch*, 48 Me. 487, it was held that where a grantee is in possession of part, under a recorded deed, he is presumed to be in possession of the whole. "The law of constructive possession declares that the deed of the lot to the settler which may be found on record . . . shall, so far as his title is concerned, be a substitute for a substantial and permanent fence around the whole": *Chandler v. Spear*, 22 Vt. 405. "If a man enters upon a tract of land under a deed duly registered . . . and has a visible occupation of part of it only, the true owner is disseised of the whole tract": *Farrar v. Eastman*, 10 Me. 195. See, also, *Pomeroy v. Stevens*, 11 Met. 244; *Nye v. Alfter*, 127 Mo. 530, 30 S. W. 186; *Shedd v. Powers*, 28 Vt. 655; *Alexander v. Polk*, 39 Miss. 738; *Forrest v. Jackson*, 56 N. H. 357. To the same effect is *Weitman v. Thiot*, 64 Ga. 17. There separate tracts had finally become a single plantation. Error was assigned upon an instruction to the jury that if a party is in possession of a part of a tract of land he is in possession to the boundaries of the tract. As to which Judge Jackson said: "The charge in respect to the extent of possession by construction, when the party actually possesses part, is right, as we understand it. The law is that

it extends as far as the boundary of the tract described in the deed if recorded, or if the boundaries are known to the contesting party." In *Johnson v. Simerly*, 90 Ga. 212, 16 S. E. 951, there had been five lots, but they really constituted one tract. The court cited *Parker v. Jones*, 57 Ga. 204, to the effect that the word "tract" means all the land embraced in the deed, no matter of how many different parcels it was originally composed, and approved a charge that the possession of a part would be constructive possession of the entire tract, if the deed was properly recorded. Possession under such a deed of a part of the land thus conveyed would embrace the whole tract thus described in the deed.

On the other hand, there are cases to the effect that record of the color is not necessary. In 1 American and English Encyclopedia of Law, second edition, 860, will be found a reference to a case in the supreme court of the United States, construing a Tennessee statute, and cases from California, Illinois, Mississippi, New Hampshire and North Carolina, ⁸⁴² holding that registration of the color is not essential. The ruling in *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904, is to the same effect, for it is there said that the rule requiring registration was to be limited to those cases where there were independent and distinct lots: See *James v. Patterson*, 62 Ga. 527; *Tritt v. Roberts*, 64 Ga. 156; *Griffin v. Lee*, 50 Ga. 224, 15 S. E. 810; *Anderson v. Dodd*, 65 Ga. 402. It may be argued, however, that while there is a presumption that the code states the law as it was, yet where there was a conflict in the decisions, one of its most useful offices was to settle the conflict and remove the doubt; that the use of the words "contiguous property," instead of "contiguous lots," in effect made statute law the principle involved in *Weitman v. Thiot*, 64 Ga. 11, and in *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951, which in turn were based on the principle announced in the much older case of *Nevers v. Prescott*, 4 Mason, 330, Fed. Cas. No. 11,390; and that *Knight v. Isom*, 113 Ga. 617, 39 S. E. 103, and *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436, were really based on the Civil Code, section 3587, without having attention called to the fact that the deeds under consideration were older than the code. Whatever section 3587 may mean—whether it refers to single tracts or plantations like those described in the *Weitman* and *Johnson* cases, or to contiguous lots, mentioned in *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904, can make no difference in the present case. Nor can we, under the record here, undertake to review cases which

construe section 3587, when the plaintiff's case involves the construction of deeds executed long before the code, and where some were recorded and some not recorded. The case is to be controlled, not by section 3587, and not by cases which were construing that section, but by the law as it existed between 1881 and 1896: *Pollard v. Tait*, 38 Ga. 439 (4). We have already shown that there was a conflict at that time. How that conflict is to be resolved depends upon rules of construction usual in such cases. On an examination of the authorities we find that older cases, not cited in any of the opinions above referred to, and not called to the attention of the court in this case, hold in effect that possession of a part of a known tract gives constructive possession of all the lands in such known tract which are described in the color: *Wiley v. Warmock*, 30 Ga. 701; *Morrison v. Hays*, 19 Ga. 296; *Griffin v. Sketoe*, 30 Ga. 300. These older authorities control.

The assignment in the cross-bill does not raise any distinction ⁸⁴³ between the law before and after the code, nor suggest that the charge, if right under the code, was inapplicable to the facts. All of the other assignments of error were abandoned. While, as stated above, the charge of the court in following *Knight v. Isom*, 113 Ga. 617, 39 S. E. 103, was inapplicable to the facts of the case, we are not called upon to decide whether it was or was not a correct statement of the law since the adoption of the code. And for that reason the judgment is affirmed on both bills of exceptions.

All the justices concur.

The Registration of Instruments, as affected by a mistake in the names of parties thereto, is discussed in the monographic note to *Koch v. West*, 96 Am. St. Rep. 402, 403; *Agurs v. Belcher*, 111 La. 376, 100 Am. St. Rep. 485, 35 South. 607.

Color of Title need not necessarily consist of recorded instruments, unless the statute of limitations expressly so requires: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 711, 712.

Actual Possession of part of a tract, under color of title, usually draws thereto constructive possession of the entire tract: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 703. But see *Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co.*, 82 Miss. 180, 100 Am. St. Rep. 627, 33 South. 845.

KELSOE v. TOWN OF OGLETHORPE.

[120 Ga. 951, 48 S. E. 366.]

DEDICATION OF STREET—Necessity of Acceptance.—Before there can be a dedication of land laid out by the owner as a public street, the municipality must express its assent thereto by acceptance. (p. 140.)

DEDICATION OF STREET—Implied Acceptance.—Acceptance of a dedication for a public street may be shown by proof that the municipal authorities exercised control over the street; but where a large area is laid off into lots and streets by the owner, there can be no implied acceptance of any street over which the corporate authorities never assume control. (p. 140.)

DEDICATION OF STREET—Acceptance of Part.—If a municipality assumes control over a portion only of a street laid out by the owner of land, it will not be deemed to have accepted an easement over another portion of the street as to which there has been no exercise of corporate authority. (p. 141.)

PUBLIC STREET—Abandonment by City.—While Prescription does not run against a municipal corporation with respect to land held for a public use, yet it may, by voluntary abandonment, relinquish its control over streets dedicated to it for the use of the public. (p. 141.)

PUBLIC STREET—Abandonment by City through Nonuser.—The abandonment of a public street by a municipal corporation may be inferred from a nonuser thereof for a period of forty years. (p. 143.)

Joseph H. Hall, for the plaintiff.

Davis & Turner, for the defendant.

952 EVANS, J. Mrs. M. M. Kelsoe instituted an equitable proceeding against the town of Oglethorpe, to enjoin the defendant from opening and improving certain streets over land to which she claimed the absolute title. The defendant denied that the plaintiff had title to the land over which the municipal authorities had undertaken to lay out these streets; and alleged that in 1849 Judge E. G. Cabaniss, who was then the owner of the land claimed by the plaintiff, as well as of the land now occupied by the town of Oglethorpe, made a plan and map dividing his land into squares, streets, and alleys, that lots were sold with reference to such plan and map, and that the streets now sought to be opened were streets which were defined in said map and which had been dedicated to the municipality for the use of the public. The defendant further pleaded that, in a former suit between it and the plaintiff, the merits of the present controversy were adjudicated adversely to her, and that she was concluded by the judgment rendered in that suit. On the hear-

ing before the court for an interlocutory injunction, the following facts were made to appear: In 1849 Judge E. G. Cabaniss was the owner of a large tract of land, and in that year had it surveyed and platted into town squares, streets, and alleys. Some of the lots in these squares were sold at public outcry with reference to a map made in accordance with said survey. Within the limits of the land claimed by Mrs. Kelsoe, streets were laid off on this map, but none of these streets have been used by the public within the past forty years, nor has the municipality at any time during that period exercised any control over the same. In 1877 Mrs. Kelsoe purchased her land from W. B. Hill, who held title under Cabaniss and his grantees. In the deed from Hill to Mrs. Kelsoe, two of the boundaries of the land she purchased were named to be Macon and Crescent streets. At that time the land was inclosed and had been cultivated as a farm by her predecessors in title for at ⁹⁵³ least thirteen years. Since her purchase she has been in the actual, open, peaceable, and exclusive possession of the land, cultivating it as a farm, without let or hindrance on the part of the town of Oglethorpe or any person whomsoever. The streets which were sought to be opened by the town authorities were the same streets which had been laid off and defined in the Cabaniss map. There was also evidence to the effect that Judge Cabaniss had undertaken to make a dedication to the town of Oglethorpe of all of the streets shown on this map, for use by the public. But no express acceptance by the municipality of any of these streets was shown, nor does it appear that the town authorities ever exercised any control over the streets laid off on that map within the boundaries of the land now occupied by Mrs. Kelsoe, nor is it clear that they were used by the public as regular thoroughfares at any time. Streets on the opposite side of Macon street, which was the eastern boundary of Mrs. Kelsoe's farm, had been continuously used by the public and had been under the control of the town authorities ever since the town was incorporated; but these streets were never extended, as is now proposed, across Macon street and through Mrs. Kelsoe's land by the municipality. The public has not used any street over her land for a period of forty years or more. Upon this evidence the court revoked the restraining order theretofore granted by him, enjoining the town from opening any streets through the plaintiff's farm, and she accepted to the revoking of this order and to the refusal of the court to grant her an interlocutory injunction.

1. From the foregoing statement of facts it will be seen that the town of Oglethorpe asserts a right to open certain streets through the plaintiff's land under an alleged dedication thereof to the municipality, made by Judge Cabaniss in 1849. Before there can be a dedication to a municipality of a tract of land laid out by the owner as a street to be used by the public, the municipality must express its assent to the dedication by acceptance. A private individual cannot, by laying out streets through his land, impose upon a municipality the burden of maintaining the same for the use of the public; it has a right either to accept or reject the proffered dedication. Purchasers of lots sold with reference to streets laid out over private property by the owner of the same would acquire the right of ingress and egress over such ⁹⁵⁴ streets; but the municipality, if unwilling to assume the burden of keeping these streets in repair by accepting in behalf of the public an easement over the land thus set apart as thoroughfares, would have no right to exercise control over the same or prevent them from being closed or obstructed. In other words, a gift cannot be bestowed without the assent of the person to whom it is proffered; and if he declines to accept it, he can assert no claim thereto.

2. Acceptance by a municipality of an easement over land which the owner desired to dedicate to the public for use as a street may be shown by proof that the municipal authorities exercised acts of control over the street. But when a large area of land has been laid off into lots and streets by the owner, there can be no implied acceptance of any street over which the corporate authorities have never assumed control. And if the municipality assumed control over a portion only of a street thus laid out, it will not be deemed to have accepted an easement over another portion of the street, as to which there has been no exercise of corporate authority: *Winnetka v. Prouty*, 107 Ill. 218 (4), 224.

The proof that the town of Oglethorpe has assumed control over streets running at right angles to Macon street and lying east of that thoroughfare would not, of itself, authorize the conclusion that there was a dedication of any streets laid off by Cabaniss on the west side of Macon street and running through the tract of land now claimed by the plaintiff. In the absence of such a dedication, it was not the right of the municipal authorities, merely because they had accepted and used streets on the east side of Macon street, to extend those streets through the farm of Mrs. Kelsoe.

3. Conceding, however, that the defendant established that after the publication of the plat made by Judge Cabaniss and the sale of town lots with reference to the streets named and located on that plat, the town of Oglethorpe did open up streets across the land now claimed by the plaintiff, in accordance with that plat, it seems clear that the municipality has long since lost the right to maintain such streets, because of its abandonment of the same. It will be noted that at the time Mrs. Kelsoe acquired title to her land, those streets, if ever previously opened and used, were closed, and her predecessors in title had, for a ~~was~~ period of thirteen years, cultivated the land without reference to any streets ever having been opened through that tract. Her possession began without any notice from the town authorities that the municipality claimed an easement over any portion of the land she acquired by her purchase. Any right which the town may originally have had to open the streets which its authorities now seek to lay out had apparently, at the time she bought, been voluntarily relinquished by nonuser for a period of many years; and her possession continued for twenty-seven years after her purchase without any effort on the part of the town to assert any right it may once have had to extend its streets, in conformity to the Cabaniss plat, across the land she bought. "An easement may be lost by abandonment, or forfeited by nonuser, if the abandonment or nonuser continue for a term sufficient to raise the presumption of release or abandonment": Civ. Code, sec. 3068. A street over which a municipality has once exercised control may, by vacation or abandonment, cease to be a public thoroughfare: Elliott on Roads and Streets, 2d ed., sec. 871. Nonuser of a street for a period of some forty years as was shown in the present case to be true, certainly ought to raise a very strong presumption of abandonment. While prescription does not run against a municipal corporation with respect to land held by the municipality for public use, yet a municipal corporation may, by voluntary abandonment, relinquish its control over streets dedicated to it for use by the public. In the case of *Norrel v. Augusta Ry. etc. Co.*, 116 Ga. 313, 42 S. E. 466, 59 L. R. A. 101, so confidently relied on by counsel for the defendant in error, the strip of land in controversy, had been conveyed by deed for use as a public thoroughfare, and the authorities had accepted the deed, but had only opened and used longitudinally about one-half of the strip of land described therein. In that case it was held that adverse possession of the unused portion of this strip by a

private individual could not ripen into a prescriptive title, although such possession was under a deed from the dedicator made subsequently to the deed to the municipality. In the present case, the plaintiff in error is not a prescriber, but the occupant of land which she has held for a long period, claiming under the same person from whom the defendant corporation asserts it derived the right to lay out streets through this land. The defendant does not claim to have acquired the ~~956~~ fee to any portion of this tract, but simply an easement over the same by dedication of certain streets for use by the public; and the question here presented is, Has there been a nonuser of such easement for such a period of time as would necessarily raise the presumption of a voluntary abandonment? "In none of the cases does an abandonment appear to have been considered as established when the period of nonuser was less than the period necessary to establish adverse possession, except where a new highway has been opened and established in place of the one abandoned; and while the court has occasionally refused to name any fixed period of time as necessary to constitute an abandonment by nonuser, in some cases the statutory period of prescription has been stated to be necessary": 15 Am. & Eng. Ency. of Law, 2d ed., 405. The current of authority seems to be that mere nonuser for twenty years affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstance indicating an intention to abandon appears; and if there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, a much stronger presumption of extinguishment will arise: *Corning v. Gould*, 16 Wend. 531; *Wright v. Freeman*, 5 Har. & J. 477; *Yeakle v. Nance*, 2 Whart. 123, 131; *Peoria v. Johnston*, 56 Ill. 51; *Winnetka v. Prouty*, 107 Ill. 218; *Jennison v. Walker*, 11 Gray 423. In the case before us there was not only nonuser for at least forty years, but, during that period, the plaintiff and her predecessors in title inclosed and cultivated the land she now claims; the public at no time during that period used any of the streets which may formerly have been laid out across her farm, and the town authorities exercised no right of control over the same, but apparently acquiesced in, if they did not in the first instance assent to, the closing up of these streets. In view of these circumstances, a presumption of abandonment is inevitable. And it is a signifi-

cant fact that the municipality appears to have been unable to bring forward any proof tending to overcome this presumption.

4. As stated above, abandonment may be shown by nonuser. The record in this case discloses that the town authorities have not, during the long period of forty years, attempted to use any portion of the land now held by Mrs. Kelsoe. If there ever was ⁶⁵⁷ a case from which abandonment could be inferred from long-continued nonuser, this case is the one. The answer of the defendant set up the defense of *res adjudicata*; but the bill of exceptions does not contain any evidence relating to this matter, or disclose that any evidence was offered by the defendant in support of this defense. It is true that in the transcript of the record transmitted to this court there appear what purport to be copies of the pleadings of a former suit between the parties to the present litigation; but this court cannot properly consider these unauthenticated documents as having any bearing on the case or place in the transcript of the record: *Sayer v. Brown*, 119 Ga. 540, 46 S. E. 649; *Griffis v. Baxter*, 119 Ga. 612, 46 S. E. 840. The bill of exceptions purports to contain all the evidence introduced on the hearing. We cannot, therefore, assume that the originals of these documents were admitted in evidence, or that any other evidence bearing on the plea of *res adjudicata* was presented to and passed on by the court below. Under the evidence as brought to this court in the bill of exceptions, we are constrained to hold that the judge erred in revoking the restraining order and refusing to grant an interlocutory injunction.

Judgment reversed.

All the justices concur.

A Dedication of Property to a public use, to become effective, must ordinarily be accepted: *Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212, and cases cited in the cross-reference note thereto; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599, 12 Atl. 424; monographic note to *State v. Trask*, 27 Am. Dec. 562. See, however, *Cook v. Totten*, 49 W. Va. 177, 87 Am. St. Rep. 792, 38 S. E. 491. Formal acceptance is not, as a rule, necessary; acceptance may be inferred from acts of recognition, control, or user: See the monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 753-761; *Edwards etc. Construction Co. v. Jasper County etc.*, 117 Iowa. 365, 94 Am. St. Rep. 301, 90 N. W. 1006; *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616, 57 N. E. 735. According to *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230, acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets

and alleys so appearing, unless an intention to limit the acceptance is shown.

On the Abandonment of Streets by nonuser, see *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383; *Madison v. Mayers*, 97 Wis. 399, 65 Am. St. Rep. 127, 73 N. W. 43; *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752, 15 S. E. 951; *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230. The public cannot be barred of its right to a public street through the adverse possession of a lot owner: See the monographic notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495; *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 778-780. The maxim "*Nullum tempus occurrit regi*," is the subject of a monographic note to *Bannock County v. Bell*, 101 Am. St. Rep. 144-188.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MERCHANTS' BUILDING IMPROVEMENT COMPANY
v. CHICAGO EXCHANGE BUILDING COMPANY.

[210 Ill. 28, 71 N. E. 22.]

CONTRACTS.—Subscription Contracts are not of that class of contracts requiring a particular or formal delivery, nor is it necessary that the acceptor, or person who performs the act or does the thing for or toward which the subscription is to go, shall be in esse at the time the subscription is made in order that it shall be valid. (p. 149.)

SUBSCRIPTION CONTRACTS are Favored in Law as being calculated to foster and encourage public and quasi public enterprises, and performance is the only acceptance, or notice of acceptance required. (p. 149.)

SUBSCRIPTION CONTRACTS—Notice of Conditions.—Failure to give notice of certain conditions contained in a subscription contract made by a corporation, does not defeat a recovery thereon, if the corporation through its proper officers had actual notice of such conditions. (p. 151.)

SUBSCRIPTION CONTRACTS—Conditions—Construction.—A condition in a subscription contract that the subscriber will pay a certain sum per year during the time a certain corporation shall occupy a building to be erected, "said occupation to be continuous and free from rent, and said payments not to continue beyond the period of fifteen years," does not require such corporation to obtain a building lease for fifteen years, but limits the subscriber's liability to the time of actual occupation by the corporation, not exceeding fifteen years. (p. 151.)

SUBSCRIPTION CONTRACTS—Conditions—Construction.—A subscription contract providing that a certain corporation shall occupy a building, when erected, "rent free," is not violated by requiring such corporation to pay one dollar per year as rental for premises worth thirty thousand dollars per year. (p. 151.)

SUBSCRIPTION CONTRACT—Conditions—Ownership of Premises.—If a subscription contract specifies that the subscription is to be paid to the owner of the premises where a certain stock ex-

change is located, the ownership of the building and of the space occupied by such stock exchange is a sufficient compliance with the subscription contract, although such stock exchange building is erected on leased ground. (p. 152.)

The following is the subscription contract out of which this suit arose, together with the receipt given by C. I. Peck:

"Whereas, an effort is being made to secure the location of the Chicago Stock Exchange in a building to be erected upon lot one (1) and the east part of lot two (2), in block fifty-five (55), original town of Chicago, with a view of benefiting property interests in that vicinity, and in order to induce it to locate there it will be necessary to offer a large amount of valuable office and room space, not less than six thousand (6000) square feet, free of rent, therefore it is proposed to erect upon said land a new fire-proof building, with quarters adapted to the purpose of the Chicago Stock Exchange and to furnish the same to it as stated:

"Now, therefore, we, the undersigned, owners of buildings in the neighborhood of said property, do severally agree to pay, annually, the sums set opposite our respective names for and during the time that said Chicago Stock Exchange shall actually occupy the entire space of six thousand (6000) square feet, or more on the first or second floor, or both, of said proposed building, as its general stock exchange room in which its stock exchange business is transacted, said occupation to be continuous and free of rent, and said payments are not to continue beyond the period of fifteen (15) years; said payments to be in consideration of the benefits to us of such location, and to be paid in equal quarterly installments to the owner or owners of the premises where said stock exchange shall be located upon satisfactory evidence being given as to who said owners may be, when required, toward providing a fair rental to the owners of the property for the space to be occupied by the stock exchange free of rent, provided one of the main entrances to said main stock exchange room shall be from Washington street. Said building to be erected and occupied by said stock exchange on or before January 1, 1895.

"Merchants' Building Improvement Company, by W. F.

Furbeck, president.....\$2,500

"Attest: WALLACE HECKMAN,

"Secretary."

"Chicago, Illinois, December 2, 1892.

"This is to certify that the undersigned has received from

the Merchants' Building Improvement Company and the Chamber of Commerce Safety Vault Company, subscriptions, each in the sum of \$2,500 per annum, for fifteen years, on certain conditions, toward providing space on the west side of La Salle street, between Washington street and Calhoun place, for the Chicago Stock Exchange, free of rent. We hereby agree, in the event that we do not enter into a written contract binding upon the Chicago Stock Exchange to occupy said premises in accordance with the terms of the said subscription, and notify the said subscribers thereof before May 1, 1893, then the said subscription shall be null and void and the subscription paper above mentioned shall be returned to the respective subscribers.

"ESTATE OF P. F. W. PECK,

"By CLARENCE I. PECK,

"Atty."

Peck, Miller & Starr, Heckman, Elsdon & Shaw and Tenney, McConnell, Coffeen & Harding, for the plaintiff in error.

J. S. Cooper and C. M. Osborn, for the defendant in error.

²⁰ RICKS, J. At the close of plaintiff's evidence, and at the close of all the evidence, the defendant (plaintiff in error) asked a peremptory instruction to find for the defendant, and ²¹ the first question presented is whether there is evidence tending to support the material allegations in plaintiff's declaration. Plaintiff in error contends that the peremptory instruction should have been given upon numerous grounds, which will be examined in the order they are presented.

It is said the subscription agreement was limited and restricted by the receipt given by Clarence I. Peck at the time of the delivery of the subscription to him; that both constituted contemporaneous writings forming part of the same contract, are to be read together, and that the receipt agreement, which plaintiff in error terms "the subscription condition," was not complied with. We think some confusion has arisen by the use of the term "Peck estate," so frequently mentioned and forcefully dwelt upon by plaintiff in error and often used by the witnesses in testifying in this case. It appears that long prior to any of the agreements involved in this suit, P. F. W. Peck died owning a large estate, which passed to his four sons, Walter L., Clarence I., Ferdinand W. and Harold S. Peck; that they took the property as tenants in common and that it remained undivided; that after the death of the father the son Harold S. died, leaving his widow, Anna, who was his sole

devisee and executrix of his will, and that at the time of the inception of the matters out of which this suit arises, the three sons, and Anna, the daughter in law, widow of Harold S., were the owners of the property termed the "Peck estate." It also appears that the sons, who operated and managed their property interests largely together, had an office in the Auditorium building, and that Anna Peck, the one-fourth owner of the property one hundred feet square at the corner of Washington and La Salle streets, had her separate office on Madison street, and that Charles H. Gould was her representative; that as relates to this case, the Peck estate means the tenants in common of the last-named tract. Aside from the lands held in common by the four ³² persons above named, there seem to have been matters properly pertaining to the estate of P. F. W. Peck which were transacted by the Peck brothers at the Auditorium. The Peck brothers were active in obtaining the subscription from plaintiff in error and from other persons. There is no evidence tending to show that Ferdinand W., Walter L. or Anna Peck, or the defendant in error, had any knowledge of the receipt agreement, or "subscription condition," as it is termed, until after the erection of the defendant in error's building and its occupancy by the Chicago Stock Exchange, other than what would be imputed to them or it, or implied from the knowledge of Clarence I. Peck, who executed said subscription condition, purporting to act as the attorney for the Peck estate and who became the president of defendant in error at its organization. There is no evidence in the record tending to show that the Peck estate, as such, was authorized, by will or other form of trust, to engage in undertakings such as are here involved, or that Clarence I. Peck was its attorney or authorized in any manner to bind it. The subscription was not to the Peck estate, but was to any person or corporation that could give satisfactory evidence of ownership of the premises where the Chicago Stock Exchange—not the Stock Exchange building—should be located. The subscription receipt or subscription condition was not delivered or put in circulation with and as a part of the subscription, and was not to be delivered with and as a part of the subscription, but purports on its face to be a private agreement made between the plaintiff in error and the Peck estate, through Clarence I. Peck, under the designation of its attorney, and held by plaintiff in error, and if binding at all it would be upon the Peck estate.

The subscription is not of that class of agreements that requires a particular or formal delivery. It is not necessary that the acceptor, or person who performs the act or does the thing for or toward which the subscription ³³ is to go, shall be in esse at the time the subscription is made: *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Johnston v. Ewing Female University*, 35 Ill. 518; *Richelieu Hotel Co. v. Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044. By placing it in the hands of Clarence I. Peck, the plaintiff in error made him its agent to deliver or communicate it to the world, or to any person or corporation that would comply with it. It made or contained on its face no reference to any condition or requirement other than those expressed therein. When the defendant in error corporation was organized this subscription paper was turned over to it, and it had no knowledge of the supposed subscription condition until the building was completed, occupied by the Chicago Stock Exchange, and a demand made upon plaintiff in error for one of the installments of subscription.

The contention that the subscription was a contract between the Peck estate and plaintiff in error cannot be admitted. Plaintiff in error assumes this false premise, and then argues that the contract being to the Peck estate, defendant in error took it cum onere. The contract was between plaintiff in error and defendant in error if defendant in error performed according to the terms of the subscription, and the performance was the acceptance, and the only acceptance by it, that was necessary. When apprised of the subscription, if defendant in error performed it, the minds of the parties did meet as a matter of law. These subscription contracts are favored in law, and are calculated to foster and encourage public and quasi public enterprises, and have, as to the matter of delivery, acceptance and performance, been looked upon and construed upon the same principle as rewards for the arrest of criminals, and other similar matters made by proclamation or by newspaper advertisement, and performance is the only notice of acceptance required.

Actual notice to defendant in error of the supposed condition was a question of fact, with which we are not ³⁴ to deal. We are not disposed to hold, as a matter of law, that the knowledge that Clarence I. Peck, purporting to act for the Peck estate in a matter that did not pertain to that estate, had agreed to a condition that, as to the Peck estate, would affect the sub-

scription in question, before defendant in error had any existence, and, so far as is shown by the evidence, was not at the time in contemplation, was such notice to the defendant in error, at its incorporation and entering upon the performance of the subscription contract, as bound it by the condition. The subscription paper does not state that it was to be performed by or ran to the Peck estate, or was relative to lands that could be denominated as of the Peck estate, but shows on its face that it was for a building upon land nearly half of which was other than that of the Peck estate, and was to the owner of the premises in which the Chicago Stock Exchange should be quartered.

The particular respects in which plaintiff in error claims that defendant in error has not complied with the alleged subscription condition are, that defendant in error did not make a binding lease with the Chicago Stock Exchange requiring that the latter should occupy the Stock Exchange building for fifteen years, and did not notify plaintiff in error thereof before May 1, 1893. The evidence shows that on January 16, 1893, the three Peck brothers and Anna Peck made a contract, in writing, with the board of managers of the Chicago Stock Exchange, by which the former agreed to organize a corporation to take leases of the ground and erect a modern fire-proof office building on the site where the building was actually built, and attached to the agreement a plan of the building showing the particular space to be occupied by the said stock exchange, being more than six thousand square feet of floor space, and said stock exchange agreed that when said corporation was organized and could transact business, a lease should be executed, setting out the terms and conditions, for a term of fifteen ³⁵ years from May 1, 1894; that the corporation was organized April 27, 1893, and a formal lease between defendant in error and said stock exchange was duly executed on May 1, 1893, providing that said stock exchange should occupy said building for the term of fifteen years from May 1, 1894; that the building was completed and the stock exchange began to occupy the space allotted to it May 1, 1894, and has ever since so occupied the same; that plaintiff in error's secretary, Mr. Heckman, who signed the subscription, between December, 1892, and May 1, 1893, was active in co-operating with the Peck brothers in soliciting and getting other subscriptions to the same enterprise and was fully conversant with the progress and steps of the plan; and the evidence tends to show that

plaintiff in error, through both its president and secretary, had notice and knowledge of all the matters that it could have had by formal notice, and if the subscription condition were a part of the contract we could not, as a matter of law, say defendant in error failed in that regard.

We are unable to adopt the view that either the subscription agreement or subscription condition required the defendant in error to make a lease with the Chicago Stock Exchange that should be binding for fifteen years. The subscription is, that plaintiff in error will pay, annually, the sum set opposite its name for and during the term the Chicago Stock Exchange shall actually occupy the entire six thousand feet on the first or second floor, or both, of said proposed building, said occupation to be continuous and free of rent and said payment not to continue beyond the period of fifteen years. The fifteen years specified in the subscription is a limitation as to time of plaintiff in error's liability, but is not a requirement to be performed by obtaining a lease for fifteen years. The payments were to be quarterly, and whenever the stock exchange ceased to occupy the building and space plaintiff in error's liability to pay ceased, and ^{so} if the stock exchange continued to occupy over fifteen years plaintiff in error's liability ceased at the end of fifteen years. If the subscription were upon the terms claimed, we regard the lease made by the Chicago Stock Exchange as binding upon it for the period named in the lease; and though the lease provides for an annual rental of one dollar, the evidence shows that defendant in error refused to receive any rent when tendered, and that the stock exchange has all of said time occupied the building free of rent. We do not regard the provision for the payment of one dollar per annum as a violation of the terms of the subscription, where the evidence tends to show the rental value of the space occupied to be thirty thousand dollars per annum. Defendant in error was entitled to have a lease requiring the stock exchange to preserve the property and observe the rules of a paying tenant, although rent should not be exacted.

It is said defendant in error failed to prove performance of the proviso to the subscription, which is: "Provided one of the main entrances to said stock exchange room shall be from Washington street." By the subscription the stock exchange might be located on the "first or second floor, or both." It was located on the second floor. There was an entrance from Washington street, easy of access and leading through spacious halls

to the stairways to the stock exchange room; also one from La Salle street. Whether the entrance from Washington street was such a main entrance as was required by the subscription was a question of fact, and not of law, and the trial court, under proper instructions, found against the contention of the plaintiff in error as to it, and the appellate court affirmed the finding.

Plaintiff in error insists that defendant in error, having but a leasehold interest in the land on which defendant in error's building is situated, is not an owner of the premises and does not come within the language of the subscription, and therefore is not entitled to perform the ³⁷ conditions of the subscription and insist upon payment by plaintiff in error. The language of the subscription is, "to be paid in equal quarterly installments to the owner or owners of the premises where said stock exchange shall be located." Plaintiff in error seems to ignore the language of the contract, and proceeds with its argument upon the theory that the contract is such that the defendant in error should be the owner of the premises upon which the building is located. Such is not the language, but it is, that the defendant in error shall be the owner of "the premises where said stock exchange shall be located." The stock exchange is located in the building owned by defendant in error, and the only question of law presented is whether the term "premises" applies only to land, or whether it may be properly held to apply to the building occupied by the stock exchange and covered by its lease. By the lease defendant in error demises to the stock exchange "the premises situated in the city of Chicago, county of Cook, as follows: That certain space on the main floor, being the first above the street floor and on the second floor of the building to be erected by the said party of the first part on the southwest corner of La Salle and Washington streets, in the city of Chicago, and which space, being about seventy feet by one hundred and one feet, including walls, as indicated upon the plans hereto attached and made a part hereof, as space for the Chicago Stock Exchange, and so marked, as shown on said plans, dividing said space so as to include a gallery for spectators, and partitions, as shown on said plans, dividing said space so as to provide room or rooms therein for the secretary, and for other purposes in connection with the business of the said party of the second part." Under this lease and under the subscription agreement it was not necessary that defendant in error should be the owner of the lot

upon which the building was located, but it is sufficient that it was the owner of the building and the space occupied by the Chicago Stock Exchange. The ³⁸ term "premises" may or may not include land, but may be held to mean only the right, title or interest conveyed, and its exact meaning, when found in contracts and conveyances, must be determined according to the intention of the parties as ascertained from the contract and the facts and circumstances attending its making: 22 Am. & Eng. Ency. of law, 2d ed., 1175, and authorities cited in note 2, p. 1176; Holbrook v. Debo, 99 Ill. 372. Defendant in error was the owner and in control of the building and the space leased to the Chicago Stock Exchange, and for all practical purposes, as related to tenants and occupancy, was the owner of the premises.

We deem it unnecessary to enter into a discussion of the contention that the subscription contract and its performance were ultra vires the charters of plaintiff in error and defendant in error. Defendant in error was organized "to render aid in the formation and maintenance of organizations in the city of Chicago for the transaction of public business in public exchanges," and plaintiff in error was by its charter authorized to improve, reconstruct, etc., the office building where it was conducting business, for its own exclusive benefit, "and to do all things incident to the conducting of such business." We think that the matters here involved were within the charter powers of the parties: Richelieu Hotel Co. v. Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; Central Lumber Co. v. Kelter, 201 Ill. 507, 66 N. E. 543.

Complaint is made of the admission of evidence and the giving and refusing of instructions, but as the case was tried. the evidence taken and the jury instructed upon the theory of the case which accords with the views of this court as expressed in this opinion, we deem it unnecessary to extend this opinion by a discussion of the several matters.

From our view of the record there is no such error as calls for a reversal, and the judgment of the appellate court is affirmed.

A Person Making a Subscription is bound thereby, if the terms are complied with and money and labor are expended on the faith of it: Galt v. Swain, 9 Gratt. 633, 60 Am. Dec. 311. As to the validity and effect of subscriptions for public buildings, see George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Bridgewater Academy v. Gilbert, 2 Pick. 579, 13 Am. Dec. 457; State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626; and as to the validity and effect of subscriptions for a bridge,

see *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118; *Cumberland Valley R. R. Co. v. Baab*, 9 Watts, 458, 36 Am. Dec. 132. On subscriptions to a corporation about to be formed, see *Richlieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, where it is held that a subscription to a corporation not yet existing is enforceable after it comes into existence, and that notice of the acceptance by a corporation of a subscription for its benefit, made before it was organized, is not necessary.

KOEBEL v. CHICAGO LANDLORDS' PROTECTIVE BUREAU.

[210 Ill. 176, 71 N. E. 362.]

TRADE NAMES—Injunction.—Generic or Descriptive Words used in different trade names will not be enjoined, except upon allegation and proof of actual fraud, or fraud resulting from the similarity of names, tending to lead those dealing with the persons adopting such trade name to believe that they are one and the same, even though they use ordinary care to discriminate between them. (p. 155.)

TRADE NAMES—Injunction.—The use of descriptive words in a trade name will be enjoined by an older concern adopting very similar words as a trade name, even though the defendant is not guilty of intentional fraud in adopting his trade name if the striking similarity in the names has resulted in embarrassment and injury to the complainant. (p. 157.)

A. B. George, for the appellants.

Cheney & Evans and J. F. Holland, for the appellee.

¹⁸² WILKIN, J. It is not denied that the allegations of the bill are sufficient to justify the interposition of a court of equity to restrain the defendants in the use of the generic or descriptive words, "Landlords' Protective Department," and we are unable to see how it can be seriously contended that the evidence does not fairly support those allegations. The law undoubtedly is that the complainant, the Chicago Landlords' Protective Bureau, had no right to appropriate to itself the exclusive use of that name to the exclusion of the right of the defendants to use the descriptive words "Landlords' Protective Department," so long as the use of those words was with a legitimate and honest purpose, but whenever defendants, ¹⁸³ intentionally or otherwise, took advantage of the similarity of the name adopted by them to the one under which the complainant was incorporated and had been carrying on its business, to mislead the public, or,

without explanation, allowed their clients to be misled into the belief that the two business associations were one and the same, it violated the lawful rights of the complainant and the plainest principles of equity. Fraud is the gist of actions of this kind. Courts of equity will never enjoin the use of generic or descriptive words in a trademark or business name except upon an allegation and proof of actual fraud or fraud resulting from the similarity of the names, tending to lead those dealing with the parties to believe that they are one and the same, even though they use ordinary care to discriminate between them: *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. 667; *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, 40 N. E. 616. In the case of *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill. 129, 52 N. E. 487, on page 133 of 177 Ill., and page 488 of 52 N. E., we said: "The defendants had a right to open up their business under the firm name of Allegretti & Co., provided they did so without any intent, act or artifice to mislead dealers in the market, or the public at large, as to the identity of the firm. If they established their new business and sought to conduct it with the fraudulent and wrongful intention of attracting to themselves the custom intended for appellees, this is clearly a fraud upon the rights of the latter. Whether the business was carried on with such wrongful intent to deceive is a question of fact which was found adversely to appellants upon a hearing, and is the one we must determine from an examination of the evidence." The same doctrine is announced in *International Committee of Y. W. C. Assn. v. Y. W. C. Assn. of Chicago*, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

We think the true ground upon which the jurisdiction of a court of equity to restrain the defendants, as prayed in this bill, rests, is that the name assumed by the defendants ¹⁸⁴ is so similar to that of the complainant as to mislead and confuse the public mind in the city of Chicago as to the identity of the business in which the two parties were engaged: *Investor Pub. Co. v. Dobinson*, 72 Fed. 603; *Guardian Fire Assur. Co. v. Guardian etc. Ins. Co.*, L. R. 50 Ch., N. S., 253; *Lee v. Halley*, L. R. 5 Ch. App. Cas. 155; *Knott v. Morgan*, 2 Keene, 215; *United States Mercantile Reporting Co. v. United States Mercantile Reporting etc. Assn.*, 21 Abb. N. C. 115; *Matsell v. Flanagan*, 2 Abb. Pr. 459.

Sanders v. Jacob, 20 Mo. App. 96, is a case in point illustrating the doctrine of the foregoing authorities. There the petitioner had been engaged in the practice of dentistry in the city

of St. Louis, under the business name "New York Dental Rooms," for many years. Some two months prior to the bringing of the suit the defendant, who was also a dentist, opened an office near the plaintiff's, and displayed a sign bearing the words "Newark Dental Rooms," the sign being similar in appearance to the plaintiff's sign. The court, after stating that an injunction may issue where the resemblance between the two trade names is sufficiently close to raise a probability of mistake on the part of the public or the evidence shows the design to mislead and deceive on the part of the defendant, said: "In the present case both of these elements concur. There was sufficient resemblance between the two signs to raise a probability of mistake on the part of the class of customers that frequented the plaintiff's place of business. The evidence further shows that such mistakes actually occurred. It further satisfies us that the defendant intended that they should occur."

In *United States Mercantile Reporting Co. v. United States Mercantile Reporting etc. Assn.*, 21 Abb. N. C. 115, the ground upon which the injunction was granted and maintained was stated by the judge rendering the opinion: "It seems to me that the name under which the defendant was incorporated and is doing business is such ¹⁸⁵ a colorable imitation of that of plaintiff's, that an injunction should be granted restraining its continuance. The cards and billheads in evidence show a disposition on the part of the defendant to make unduly prominent that portion of its corporate name which is most similar to the name of the plaintiff. Certain it is that the use by the defendant of its corporate name has led to confusion in the delivery of the mail matter addressed to the parties in question."

In the case of *Lamb Knit Goods Co. v. Lamb Glove etc. Co.*, 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841, this language appears: "In the present case the testimony shows that dealers have been misled, and in view of the fact that the complainant's business is largely the manufacture of gloves and mittens and that the name 'Lamb' is prominent in the corporate name, we think it is likely to mislead. The decree will be reversed and a decree entered restraining the defendant from continuing the use of the corporate name 'Lamb Glove and Mitten Company,' or any name in which the word 'Lamb' appears in connection with other words indicating a business similar to that of complainant." And so cases might be cited almost without number, to the same effect.

While it is true that the defendant Campe, who seems to have been the active member of the defendant firm in the Landlords' Protective Department, testified that he had no knowledge of the existence of the complainant corporation at the time of the organization of their department, he admits that he had knowledge of the fact that the similarity of the names was calculated to mislead the public to the injury of the complainant. He says: "I did not know of the Chicago Landlords' Protective Bureau until about five or six months ago. I didn't know it was in existence at the time I established the Landlords' Protective Department. I had not seen their letterheads. I didn't know Mr. Terwilliger or Mr. Cheney." But in answer to a question by his solicitor ¹⁸⁶ he stated that he had not instructed any of his agents to represent that they were connected with the complainant. "I warned them against it after I became acquainted with the name of the Chicago Landlords' Protective Bureau." And again: "I warned our agents against representing themselves as complainant as soon as I began to hear of the similarity of the name. . . . I cannot fix the date when I warned our agents not to represent themselves as complainant; it was within the past six months."

We have already seen that such confusion did result, as is abundantly shown by the evidence. "Landlords' Protective Bureau" and "Landlords' Protective Department" are manifestly so similar as to almost necessarily lead to complication and confusion in the business of the two parties, and it is of no importance, in this view of the case, that the defendants had no knowledge of the existence of the complainant until after they had organized their rival business, or had no intention of injuring complainant. As was said in *Newby v. Oregon Cent. R. R. Co.*, 609, Fed. Cas. No. 10,144: "Under the law the corporate name is a necessary element of the corporation's existence. Without it a corporation cannot exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation; and, as a matter of fact, in some degree, at least, the natural and necessary consequence of the wrongful appropriation of a corporate name is to injure the business and rights of the corporation by destroying or confusing its identity. The motives of the persons attempting the wrongful appropriation are not material. They neither aggravate nor extenuate the injury caused by such appropriation. The act is an illegal

one, and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it."

¹⁸⁷ It may be conceded that the evidence in this record as to the actual and intentional fraud is conflicting, and if the determination of the case depended upon that alone there would be force in the argument that the finding of the chancellor, who saw the witnesses and heard them testify, should not be disturbed, but we think the undisputed fact that the similarity of names resulted in embarrassment and injury to the complainant justified the conclusion of the appellate court, and its judgment will accordingly be affirmed.

On the Use of Generic and descriptive words as trademarks, see the monographic note to Kyle v. Protection Mattress Co., 85 Am. St. Rep. 91-102.

KEHL v. ABRAM.

[210 Ill. 218, 71 N. E. 347.]

FRAUDULENT REPRESENTATIONS—Degree of Care Exercised—Question of Fact.—If it is alleged that the defendant made false representations in that he falsely represented to plaintiff that a note and trust deed sold by him to the latter were a valid and first lien upon the premises, the degree of prudence exercised by the plaintiff in the transaction is a question of fact for the jury to determine. (p. 159.)

FALSE REPRESENTATIONS OF FACT.—A false representation that a trust deed is a first lien upon premises, and that there are no prior mortgages or trust deeds upon them, is a representation of fact, and not a mere opinion. (p. 160.)

APPELLATE PRACTICE.—Objections to instructions made for the first time in the supreme court cannot be considered by it. (p. 161.)

FALSE REPRESENTATIONS—Trial.—Instructions stating the effect of false and fraudulent representations, "with respect to a material inducement to the transaction" are not erroneous in not defining the term "material inducement." (p. 161.)

APPELLATE PRACTICE.—Objections Based upon the Opinion of the lower court will not be reviewed upon appeal. The appellate court reviews only the judgment of the lower court and not its opinions. (p. 162.)

APPELLATE PRACTICE.—Objections to Evidence not made in the lower court cannot be urged for the first time on appeal. (p. 162.)

FALSE REPRESENTATIONS—Failure to Examine Records.—If one person falsely represents that a trust deed is a first lien on premises, intending that another shall act on such representation, and

the latter is thereby induced so to act to his injury, the first person cannot escape liability, although an examination of the records would have disclosed the falsity of such representation. (p. 163.)

R. R. Jampolis and J. Hibben, for the appellant.

F. L. Hume, for the appellee.

²¹⁹ RICKS, C. J. This is an action for damages for deceit. The narratio averred that May 5, 1893, appellee purchased from appellant a note for two thousand dollars, payable to order of makers and due one year after date; also a trust deed securing the same; that prior to the purchase appellant represented to appellee the trust deed was a first lien upon premises described, and ample security; that appellant made such representations knowing them to be false, to induce the purchase; that appellee was ignorant of their falsity and appellant fraudulently concealed the knowledge thereof from him; that appellee relied upon the statements, and not until January, 1896, did he learn there was a prior trust deed upon the premises for seven thousand dollars, and that they were not worth more than the amount of such encumbrance; ²²⁰ that the said first trust deed was foreclosed, the property sold, and the lien of appellee cut off; that on October 18, 1893, appellant repeated the representations to induce appellee to agree to an extension of the note until October 15, 1896; that appellee, in ignorance of the falsity of the representations and relying upon their truth, granted the extension. To this declaration a plea of not guilty was filed. The cause was tried before a jury in the circuit court of Cook county, and the issues were found in favor of plaintiff and his damages assessed at three thousand two hundred dollars, for which amount judgment was entered, and on appeal to the appellate court for the first district said judgment was affirmed.

The main fact in controversy in the lower court was whether the representations by appellant were made, and the testimony with reference thereto was conflicting. On this proposition the jury found in favor of appellee, and the appellate court having affirmed that finding the question is not now open for our consideration. Appellant, however, in this court, urges eleven propositions for the reversal of the judgment of the appellate court.

It is first contended that the alleged representation that the trust deed was a first mortgage was simply the expression of an opinion and not a statement of a fact, and hence, if made, did not amount to a legal fraud, and that the statement was in itself

sufficient to put appellee on notice, and it was his duty to have examined the records and ascertained the truth. The question of the degree of prudence exercised by appellee was a question of fact within the determination of the jury, and their decision was in favor of appellee: *Munson v. Nichols*, 62 Ill. 111. As to appellant's contention that the alleged representations were those of opinion instead of fact, we think the point is not sustained by reason or authority. The declaration states that "the plaintiff avers that before he so purchased said note of the defendant, the defendant represented to the plaintiff that the aforesaid ²²¹ trust deed securing said note was a valid and first lien upon the premises in the said trust deed mentioned; that there were no other trust deeds or mortgages upon said premises prior to or ahead of the lien of said trust deed." It seems clear to us that whether the trust deed in question was prior to and ahead of all other trust deeds and mortgages was a question of fact, and the bare statement of the proposition is sufficient argument of it, and such conclusion seems to have been assumed in the case of *Bristol v. Braidwood*, 28 Mich. 191. The question presented in that case grew out of an exchange of a mortgage for other property, the party having the mortgage representing that "there was no other mortgage ahead of it, so far as he knew," and the court, in the opinion rendered, said (page 194): "The whole question of misrepresentation and fraud must therefore turn upon the representation in reference to the fact whether there was a prior mortgage; and upon this point it may, for the purposes of this case, be admitted that if the defendant, for the purpose of obtaining the plaintiff's property for the mortgage asserted to him as a fact of which he professed to have knowledge, that there was no prior mortgage upon the land, when he knew or had good reason to believe the contrary, or no good reason to believe his assertion to be true, he would be liable as for a fraudulent representation." Authorities equally in point are *Linn v. Green*, 17 Fed. 407, and *Ward v. Winan*, 17 Wend. 192.

The second and third contentions argued by appellant are, that there was error in the second and fourth given instructions of appellee. Upon an examination of those instructions we are of opinion that appellant's criticism is without merit. But we are precluded from considering them, for the reason that in appellant's written motion for a new trial in the circuit court no mention was made of these instructions as ground for said motion: *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *West*

Chicago Street ²²³ R. R. Co. v. Krueger, 168 Ill. 586, 48 N. E. 442; Illinois Cent. R. R. Co. v. Johnson, 191 Ill. 594, 61 N. E. 334. And it further appears from the brief filed by appellant in the appellate court, certified to this court, that this objection was not raised in that court, which fact also prevents our consideration of this objection: Case v. Phillips, 182 Ill. 187, 55 N. E. 66; Chicago etc. R. R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N. E. 518; Rohe v. Pease, 189 Ill. 207, 59 N. E. 520.

Appellant's fourth objection is, that it was error to refuse his seventh refused instruction. This instruction was virtually covered by appellee's second given instruction. But appellant insists that said second given instruction of appellee was vicious, because it told the jury that if a party dealing with another makes use of fraudulent statements, representations, and acts "with respect to a material inducement to the transaction," etc., such party cannot afterward be heard to say that the party with whom he was dealing was misled, etc., and appellant contends that it was error to have mentioned "material inducement" without defining such term; that what is "material inducement" is a question of law and not of fact; that the said seventh instruction so offered was free from this fault, hence it was error to refuse it, even though it was otherwise covered by said second instruction given for appellee. Appellant, in this connection, relies upon the case of Baker & Reddick v. Summers, 201 Ill. 52, 66 N. E. 302, where it was held erroneous for an instruction to refer to material allegations of a declaration without stating what the material allegations were. We think there is a broad distinction between material allegations of a declaration and material inducements to a party entering into a transaction. A declaration, as referred to in the case cited by appellant, is strictly a legal term, and one not versed in legal phraseology would not be supposed to be able to determine, without direction, what are the essential or material parts of a declaration, but a jury are supposed to be as well acquainted ²²³ with human nature as the judge who instructs them and know as well the things that prompt individuals to action, and it is peculiarly their province to say what are and what are not material inducements in a transaction where one party claims to have been overreached and deceived by the alleged false conduct of another against whom redress is sought. If the jury are of the opinion that the alleged false statements were of no consequence in causing the plaintiff to act as he did, it is their duty to find

in favor of the defendant, otherwise against him. This principle is recognized and applied in the law governing insurance policies, and in actions upon such, the jury may be instructed that if the statements made to secure the policy have been fraudulent and are material, then the policy may be avoided, but where the statements, though not correct, have not been material in inducing the issuance of the policy, then the same is not to be avoided, and in such cases the question of the materiality is left to the determination of the jury: *Manufacturers' Ins. Co. v. Zeitinger*, 168 Ill. 286, 61 Am. St. Rep. 105, 48 N. E. 179.

Appellant's fifth objection is based upon the opinion of the appellate court, and as this court only reviews the judgments of that court, and not its opinions, this objection will not be discussed: *Pennsylvania Co. v. Versten*, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798; *Daube v. Tennison*, 154 Ill. 210, 39 N. E. 989; *Voight v. Anglo-American Provision Co.*, 202 Ill. 462, 66 N. E. 1054.

Appellant's sixth objection is relative to the refusal of the court to give his second and fourth refused instructions, and the refusal of the court to grant a new trial. These instructions were practically covered by appellee's second given instruction, so we think no material injury could have resulted to appellant by the refusal. In this assignment of error appellant contends that the evidence of appellee of what occurred at the time of the purchase of the mortgage is uncorroborated and is denied by appellant. It is true, the evidence is very contradictory, but it was the province of the jury ²²⁴ to weigh and consider it, and we cannot say, as appellant contends, that the jury was so erroneously instructed as to require its verdict to be set aside and make it the duty of the court to grant a new trial.

Appellant's seventh objection is, that improper evidence was admitted on the trial; but no exception appears to the overruling of the objection to its admission, which is necessary in order to bring the question properly before us for review; and it also appears, from the certified copies of the appellant's brief in the appellate court, that this objection was not urged in the appellate court, which fact also prevents our consideration of the matter.

Appellant's eighth objection is, that the court erred in overruling the motion in arrest of judgment. The point sought to be made here by appellant seems to be, that as the declaration contained no averment excusing the want of investigation of the

records on the part of the plaintiff, therefore his motion should have been allowed. As we have before noted, it was a question for the jury whether appellee exercised due care, and if they found he did (as is the case), it was then immaterial whether he investigated the records or not. The declaration charges that the representations were known to be false by appellant and were made for the fraudulent purpose of inducing the action of appellee and that appellee relied and acted thereon. In *Linington v. Strong*, 107 Ill. 295, we said (page 303), "As between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." And also in *Antle v. Sexton*, 137 Ill. 410, it was said (page 413, 27 N. E. 691, 692): "Where a misrepresentation ²²⁵ is made as to a material fact, and such misrepresentation is made knowingly and for the express purpose of deceiving and defrauding, and the party injured relies upon the statement made and under circumstances which would induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit."

The question presented in the case of *Dodge v. Pope*, 93 Ind. 480, seems to have been very similar to the question presented by the case at bar. In that case, a party sold a note and represented that it was secured by a first mortgage when in reality it was a second mortgage, and in that case the court said: "Where one, with knowledge of his rights and of the facts, makes a statement to another to induce him to act in a given way, and the statement produces the effect designed and causes the person who acts upon it to part with value, he by whom the statement was made cannot afterward be heard to deny its truth. The fact that the mortgage was of record does not change the rule. If a party makes an express statement that there is no mortgage on the land in which he endeavors to sell an interest, he is bound, notwithstanding the fact that an examination of the records would have disclosed the existence of a prior mortgage."

We think it quite clear that the declaration in the case at bar is sufficient to sustain the judgment, and the motion in arrest was properly overruled.

The tenth assignment of error is as to sustaining the judgment of the circuit court, and the eleventh is as to the refusal of the appellate court to reverse and remand the case. What has already been said disposes of these objections.

We find no material error in the record before us, and the judgment of the appellate court will be affirmed.

A False Representation as to the title of real property will sustain an action by one injured through a reliance thereon, notwithstanding the title appears upon the public records: *Hunt v. Barker*, 22 B. L. 18, 84 Am. St. Rep. 812, 46 Atl. 46. See, too, *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21.

VILLAGE OF RIVERSIDE v. MACLAIN.

[210 Ill. 308, 71 N. E. 408.]

MUNICIPAL CORPORATIONS—Irrevocable Dedication of Streets and Public Places.—If an owner of land lays off a town thereon, and makes a map of the townsite, showing it to be divided into streets, alleys, blocks, lots, and public squares, and then sells the land with reference to such map, he thereby makes an irrevocable dedication of the space, as represented on the map as streets, etc., to the use of the public, although there is no municipal corporation in existence at the time which could accept the dedication. (p. 170.)

MUNICIPAL CORPORATIONS—Dedication of Land to—Subsequent Incorporation.—If the owner of land lays off a town thereon, and makes a map of the townsite, and lots are then offered, sold and bought with the understanding that designated portions of such plat are public parks, the municipality upon its subsequent organization becomes the trustee of the public to the extent of the dedication. (p. 171.)

MUNICIPAL CORPORATIONS—Dedication to—Estoppel to Deny.—A municipality is estopped to deny that land within its limits is a public park, although it was incorporated after the dedication of such land to the public by the owner, if by its subsequent acts, ordinances, and conduct, it has recognized and treated the land as a public park. (p. 171.)

MUNICIPAL CORPORATIONS—Dedication of Park—Easement for Preservation of.—Purchasers of lots adjoining a tract of land within city limits, dedicated by the owner as a public park, and adjudged in a judicial proceeding to be a public park, have an easement therein as against the municipality to have such tract of land preserved as a public park. (p. 171.)

MUNICIPAL CORPORATIONS—Dedication of Park—Right to Put Highway Through.—A municipality has no power to put a highway through any portion of a public park, accepted as, and adjudicated to be, such park under a dedication of the land by the owner for that particular purpose. (p. 174.)

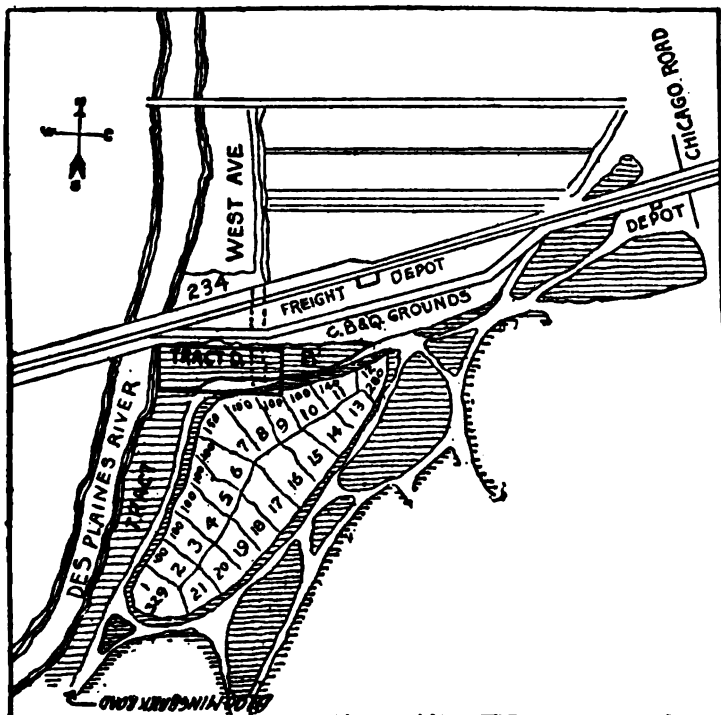
MUNICIPAL CORPORATIONS—Dedication of Land to for Special Purpose.—If land is consecrated to public use by a common-

law dedication of the owner, the municipality, within whose limits the premises are situated, takes it, as trustee for the public, for the special uses designated by the dedicator, and it cannot employ such premises or any part thereof, for any other or additional purpose, especially if not actually necessary to the use for which the land is dedicated. (p. 176.)

MUNICIPAL CORPORATIONS—Dedication of Land for Park—**Right to Put Driveway Through.**—Statutory authority given to a municipality to construct driveways through public parks is confined to parks created under statutory authority, and does not extend to a park created by the owner of the land by dedication for that particular purpose. (p. 177.)

MUNICIPAL CORPORATIONS—Dedication of Land for Park—**Injunction Against Highway.**—Owners of lots adjoining a tract of land within the limits of a city, dedicated for the purpose of a public park by the original owner, are entitled to an injunction to restrain the municipality from constructing a highway through such park, without showing any damage or injury to their lots therefrom. (p. 178.)

The plat mentioned in the opinion is here inserted:



A. C. Miller and R. Crews, for the appellant.

F. F. Reed, for the appellees.

³¹³ MAGRUDER, J. After a careful examination of the record, plats, maps and evidence we are of the opinion that the testimony sustains the findings of the court below, and that the decree entered by it is correct.

³¹⁴ About March 1, 1869, the Riverside Improvement Company, incorporated under a special act of the legislature of Illinois for the purpose of establishing a suburban town, became the owner of the south half of section 25, and the whole of sections 35 and 36 in township 39 north, range 12, east of the third principal meridian, except that part lying south of the Des Plaines river, and also of some parts of sections 1 and 2 in township 38, which lands were included within the outlines of maps and plats hereinafter mentioned, and included said block 4 and said tract B. The lands acquired lay to the east and west of the Des Plaines river in its north and south course. The Chicago, Burlington and Quincy railroad ran east and west, and a little south of west, through the tract and across the Des Plaines river. Immediately north of the railroad tracks was a tract of land, marked upon the plat "Land not belonging to the company," which was not owned by the Riverside Improvement Company, and which at that time was not subdivided. North, however, of this unsubdivided tract was a tract, purchased by the company subject to a mortgage, which was afterward foreclosed, and all the title of the Riverside Improvement Company was thereby eliminated. The latter tract was platted, and subdivided into roadways and parks upon the same plan as the land south of the railroad tracks. The tract here in controversy, and alleged to be a park or a part of a system of parks inaugurated by the improvement company, lies south of the railroad tracks and north and west of block 4 in which the lots of appellees are located. Subsequently, the northern part of the unsubdivided tract, lying north of said railroad tracks, was subdivided into lots and blocks and streets, and called "Beebe's Central Riverside addition"; and the southern part of said tract was subsequently subdivided into lots and blocks, etc., and called "Wessencraft's Homestead addition." The street lying north of Wessencraft's addition, and running east and ³¹⁵ west, was designated as Forest avenue. From Forest avenue, West avenue runs south, as designated upon the plat in the statement preceding this opinion. West avenue runs southward as far as the north line of the railroad tracks. West avenue is a street fifty feet wide, and, where it strikes the north line of the railroad right of way, is about two hun-

dred and thirty-four feet from the bank of the Des Plaines river on the west side of the street. It was dedicated as a public street, and has always been used as such. By an ordinance of the village, dated January 3, 1898, West avenue was extended across the railroad right of way to the park marked "Tract B," including tract D, in pursuance of condemnation proceedings thereupon instituted. By the ordinance of August 28, 1900, amending the ordinance of August 24, 1875, it was provided that a roadway should be constructed for pleasure vehicles and pedestrians by the extension of West avenue south across the park, marked "Tract B," to Bloomingbank road running south of said park and north and west of block 4. The extension of West avenue across the park marked "Tract B" is what is sought to be enjoined and prevented by this suit. All the property, including block 4 and the park marked "Tract B," including tract D, here in controversy, lies in the first division of Riverside.

1. The first contention made by the appellant is that the lands lying between said block 4 and the said railroad are not "public park." This contention cannot be maintained under the proofs in this case.

It appears from the written stipulation of facts, entered into by counsel and introduced upon the trial of the case, that the Riverside Improvement Company in March, 1869, as owner, subdivided and made a plat of the first division of Riverside and collected all the maps, showing the different divisions, into one map, and that this map showed the blocks, lots, parks and commons, ³¹⁶ and was hung in the offices of the Riverside Improvement Company in Chicago and Riverside; that the company sold the lots with reference to the same; made accurate surveys of the lots and blocks and parks platted into three divisions; recorded the plats on September 21, 1869; placed the recorded plats in its offices and offered and sold lots with reference to the maps and plats; that the said recorded plats showed the parks, lawns, banks and margins as places colored green (being the shaded parts in the accompanying plat), and the parts so colored green were declared by the Riverside Improvement Company to be dedicated to public use, and were so dedicated. It also appears from the stipulation and evidence that the Riverside Improvement Company continued to exhibit the recorded plats and maps referred to, and to distribute lithograph copies of the same, showing the public parks, river banks, islands, margins and commons, and represented that the places

colored green were dedicated as parks and commons to public use; that, by means of such representations, many persons were induced to purchase lots in the first, second and third divisions, including the lots now owned by appellees; that appellees purchased and acquired their lots for valuable consideration, in good faith, and with full knowledge of the suits, decrees and records hereinafter set forth, which were in existence at the time of their respective purchases; that, after the fire of 1871 which destroyed all of the original recorded maps, and also the records thereof, the Riverside Improvement Company prepared and recorded plats, which, while they do not show as colored green the portions dedicated to the public as parks by the original maps, yet show the park portions as blank and undivided premises; it also appears from the stipulation and evidence that the village of Riverside, when incorporated in 1875, accepted the dedication of the parks and commons, and assumed the custody thereof.

317 In addition to this the town of Riverside in 1872 filed a bill, in which it recognized in general terms the dedication and the existence of the parks and commons, indicated in the original recorded plats and exhibited and distributed maps. On September 17, 1885, the village of Riverside filed its original bill of complaint against the Riverside Improvement Company, Henry L. Glos et al., for the purpose of establishing by judicial proceeding the system of parks and commons, created and dedicated by the Riverside Improvement Company, in which suit a decree was entered on April 4, 1887, which established as a complete system all of the parks dedicated originally by the Riverside Improvement Company, including the premises in question, as public park and common, and this decree found that the company hung a map in its office and circulated among the people a map of the lands and subdivision thereof, showing blocks, streets, lots, parks, public grounds and commons, and distributed lithographic copies of the same in large numbers among the people, and showed the same to prospective purchasers of residence sites; and that the map so circulated showed in conspicuous colors the parks, commons and public grounds, which the owners of the sites proposed to dedicate to the public forever for the use of prospective purchasers and residents. The decree finds that, after the making of the original plat and publication of the said maps and the recording of the plat, the company sold large numbers of lots to divers persons who are now living thereon, and that the sales were made under the

representation that the parks, commons, etc., as indicated on the maps, were dedicated to the public use as streets, public grounds and commons, and in connection with the making of the sales the company improved the streets and margins, and laid off the parks and public grounds, and were in the habit of taking parties on the grounds and pointing out the places indicated as parks and public grounds, and representing that the ³¹⁸ places, so colored and indicated on the maps and pointed out, were dedicated to public use. The decree also finds that the number of persons who purchased lots on the faith of the aforesaid representation were about two hundred, and that the particular property, grounds and commons, which were represented by the Riverside Improvement Company to proposed purchasers to be public grounds and commons and to have been dedicated, are, besides certain parks and commons not here in controversy, the tract B, including tract D, as above described, and the other small parks and roadways lying east thereof and south of the railroad tracks, as shown upon the plat set forth in the statement preceding this opinion. The decree also finds that a large number of persons who purchased lots, improved the same, and became residents thereon relying upon said dedication, and accepted and enjoyed the benefit for public purposes of the pleasure grounds, and the streets, commons, and parks, and were using the same when the village was organized. It also finds that the village, by its officers, assumed charge of the streets, parks and commons, and held the same for public use, and has since exercised authority over the same, and improved the same. The decree also finds that the population of the village then numbered five hundred persons, who have enjoyed the streets, public parks and commons, and that the streets, parks and commons were dedicated by the Riverside Improvement Company for public use before the incorporation of the village by common-law dedication, and that the community accepted the same, and that the same were then held by the village by common-law dedication. And in the decree it was thereupon adjudged that said parks and commons were dedicated to the public use by a common-law dedication, and that the village of Riverside in July, 1875, accepted and received said streets, parks, highways, etc., and held, and had the right to hold, the same by common-law dedication, and had the right ³¹⁹ to control the same for the benefit of the public for the purpose of carrying the dedication into effect.

Again, on December 21, 1888, the village of Riverside filed a bill against Patrick Ronan, who had built an ice-house upon tract B, and in the suit, commenced by the filing of such bill, the village of Riverside asserted said tract to be a public park and common, and procured a decree, adjudging it to be a public park and common. At the same time the village of Riverside instituted a suit against one Charles Moeschler, which ripened into a decree, where it asserted the same positions as to original dedication of the entire park system as were asserted in the suits against Glos and Ronan.

In addition to these suits and decrees, and in addition to the facts proven and admitted by the stipulation, the village, on August 24, 1875, passed an ordinance, forbidding any driving, riding, or passing over public park, road, border or common; and on October 8, 1888, passed an ordinance, declaring all buildings and other structures by private persons on such property to be nuisances.

The evidence and facts above recited show a complete common-law dedication of the premises in question as public park and common. They demonstrate that the land, sought to be appropriated for the driveway, is public park and common, and has always been so recognized from the year 1869 by adjacent lot owners, the municipality, and the public generally. Appellees purchased in reliance upon these facts, and appellant, by its acts, declarations, ordinances, suits and decrees, has recognized and acquiesced in the dedication, and has never attempted to repudiate it, but has actively sought to establish it and enforce it not only as to other parks, but as to this identical tract here in controversy.

The law applicable to the facts above set forth is well settled. Where one, who owns lands, lays off a town or village thereon, and makes a map of the townsite, showing it to be divided into streets, alleys, blocks, and lots, ³²⁰ and then sells with reference to such map, he thereby makes an irrevocable dedication of the space, as represented on the map as streets, to the use of the public. And if there be public squares or places represented on the map, the same rule applies to them, and dedication thereof may be established in the same manner: *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215; *Zearing v. Raber*, 74 Ill. 409; *United States v. Illinois Cent. R. R. Co.*, 154 U. S. 225, 14 Sup. Ct. Rep. 1015, 38 L. ed. 974; *Town of San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405.

In such case, it makes no difference that no municipal corporation, which could accept the dedication, exists at the time the dedication is made. It is enough that the lots are offered, sold and bought with the understanding that the designated portions are public parks and commons. The municipality, which in the case at bar was the village of Riverside, upon its subsequent organization, becomes the trustee of the public to the extent of the dedication. Here, the acts, care, ordinances and decrees show that the village of Riverside accepted this tract as public park, and is estopped both by the original dedication and its own conduct from denying that the tract is public park: *Village of North Chillicothe v. Burr*, 185 Ill. 322, 57 N. E. 32; *Waggeman v. Village of North Peoria*, 160 Ill. 277, 43 N. E. 347; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Conkling v. Village of Mackinaw City*, 120 Mich. 67, 79 N. W. 6; *Marsh v. Village of Fairbury*, 163 Ill. 401, 45 N. E. 236. In *Marsh v. Village of Fairbury*, it was said (page 407, 163 Ill., page 238, 45 N. E.): "But in connection with these public rights those who purchased lots fronting on this park, took with reference to the plat, and had an appurtenant right therein, which was their own property as a right appurtenant, and that was to have the streets and block 10 remain open for public use. The vendor, or those privy to his title, would, by his acts in platting and selling lots by this plat, be estopped from inclosing block 10 as private grounds. Such being the case, the question as to whether or not the village authorities accepted the dedication of that block would not defeat the right of individual ³²¹ purchasers from asserting their rights to have the same open forever for the use of the public": *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370. In the case at bar, the evidence shows that appellees purchased their respective lots, relying upon the existence of this tract of land as a public park, and that it should always remain such. Nearly all of the appellers as lot owners purchased their lots after one or more of the decrees had been entered in the suits already referred to, begun by the village, which declared the entire park to be a public park; and they relied upon this fact as appearing of record. Each lot has an easement in the park, and, in order to maintain this easement, it is necessary that the tract in question should be preserved as a park: *Smith v. Heath*, 102 Ill. 130; *St. Paul etc. R. R. Co. v. Schurmeir*, 74 U. S. (7 Wall.) 272, 19 L. ed. 74; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145. In the latter case of *Archer v. Salinas*

City, it was said: "The same principles, which are applicable to the dedication of public streets, apply to the dedication of a public park or aquare. All dedications for public use are to be considered with reference to the purpose for which the dedication is made, or the use to which the property dedicated may be applied, and that purpose may be ascertained by the designation which the owner has affixed to the land upon the map, whether it be a street, a school lot, or a public park. The setting apart of a public park upon such map is for the convenience and enjoyment of the inhabitants of the place, and, as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received, in the increased prices for which that property was sold, the compensation for its surrender to the public as a park. . . . Dedication may be express and completed by a single act, as when the land is dedicated by deed; or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which ³²² front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use."

We are of the opinion that there was a common-law dedication by the Riverside Improvement Company of the tract in question as a public park for purposes of recreation and amusement, and that an easement of that character immediately arose and became appurtenant to the lots of appellees and can be enforced by them, especially as the evidence shows that the village has expressly and repeatedly recognized such rights, and endeavored as trustee to protect and establish them.

It is claimed that toward the western extremity of the park the lithographic maps, which were circulated, showed a roadway or passageway of some kind curving along the river bank. This fact is dwelt upon, as showing that the intention of the original dedicator was, that a road, extended from the north through the unsubdivided tract across the railroad tracks, should at some time be connected with such roadway or passageway curving along the river. If this were so, West avenue extended south is not so extended as to connect with any such roadway or passageway, but crosses the railroad track a long distance east of any place where such roadway or passageway is indicated upon the lithograph maps. If West avenue is extended across the park here in question in the manner in which

the village of Riverside proposes to extend it by the ordinance of August 28, 1900, it will cut the park designated as "Tract B" into two parts, as shown by the dotted lines across the east end of tract D. It appears from the evidence that the park, marked "Tract B," is about one hundred and twenty-five feet wide, and not more than four or five hundred feet long. The extension of West avenue over it thus divides it into two portions, so small as to destroy not only its beauty, but its usefulness as a park to the lot owners, whose residences abut upon it. If ³²³ roadways are indicated upon the plats as recorded and upon the lithographic maps as shown to the purchasers, then it was the intention of the dedicator that such roadways should run as therein indicated, and not that new roadways should be cut dividing the property into still smaller parts or portions. No passageway indicated upon any plat, which was used in the sale of lots, can be located at the point of the crossing now proposed to be made by the village.

2. It is claimed on the part of the appellant that even if the premises in question are a public park or a public common, or both, nevertheless the use of a strip across it for the purposes of a pleasure driveway will not be a misuse of said public park or public common. This contention gives rise to the question whether the proposed use of the park by the construction of a roadway through the same, resulting from the ordinance of August 28, 1900, will, under all the circumstances, be a misuse of the premises as a park.

It is not altogether clear that the roadway, if extended from the south line of the railway right of way across this park, will be a pleasure driveway. As has already been stated, the village has already extended West avenue over the railroad right of way to the north line of this park by condemnation. But this extension of West avenue, as we understand the evidence, was its extension as a public street or highway, and not as a boulevard or pleasure drive. There is nothing to show that West avenue, if extended across this park, would be restricted in the use to be made of it to a mere pleasure driveway. The evidence shows that, under some arrangement between the village and the railroad company, the grade, where this crossing is to be made, will be raised between four and five feet above the level of the park. An unsightly elevated roadway will thus be created through what has been a park, planted with trees and shrubs and cared for as such. It is not to be supposed ³²⁴ that persons, driving for pleasure, would attempt to drive

a distance of one hundred and thirty-five feet, more or less, up or down an inclined plane, and over a complicated and dangerous railroad crossing.

The evidence establishes the conclusions that the extension of West avenue over this park will be a perversion of the use for which the premises embraced in the park were originally dedicated. They were originally dedicated for the purposes of a park, and not for the purposes of a traveled roadway cutting so small a park into two parts. A park is a "place for the resort of the public for recreation, air and light": *Price v. Plainfield*, 40 N. J. L. 612. "A park is a piece of ground in a city or village set apart for ornament or to afford the benefit of air, exercise or amusement": 17 Am. & Eng. Ency. of Law, 1st ed. 407. The title to these premises is vested in the village of Riverside, as trustee for the public, and the uses to which the premises may be devoted are limited to uses as a park and common. A deviation from such use by the village is a violation of its duties as trustee for the public, and will result in damage to the property of appellees, and destroy their easement in the park. Where a park is thus cut up by the extension of a street through its middle, its use for purposes of pleasure, recreation and amusement will be destroyed. Where such a tract has been dedicated and accepted as a public park, and adjudicated to be such, the municipality has no power to convert any portion of it into a public highway, because such use is inconsistent with and destructive of its use as a park: *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Village of Princeville v. Auten*, 77 Ill. 325; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305; *City of Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927, 38 L. R. A. 849; *Board of Education v. Kansas City*, 62 Kan. 374, 63 Pac. 600; *City of St. Paul v. Chicago etc. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; *City of Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *Price v. Thompson*, 48 Mo. 361; *United States v. City of Chicago*, 7 How. 185, 12 L. ed. 660; *Wellington, Petitioner*, 325 16 Pick. 87, 26 Am. Dec. 631. In *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, it was held that a dedication must always be construed with reference to the object with which it was made, and that where streets are dedicated by means of a town plat, they will be considered as designed for the purpose of travel and passage in any mode not to destroy their usefulness, while a public square will be considered as intended for

beauty and adornment, and for the health and recreation of the public, and the municipality will have no right or power to divert it to other uses or purposes; and in that case it was said (page 543): "Streets and a public square are donated. Each has a well-known and well-defined use and meaning. The one was designed for the purpose of travel; and the right of passage over the streets in any mode not to destroy their usefulness was given by the plat. The square was intended for beauty and adornment, and for the health and recreation of the public. A dedication must always be construed with reference to the object with which it was made. The donors never could have intended that this ground should be used as a street. The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property, given to the public for one use, to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. . . . The city has accepted the trust. It must be preserved, or the land must revert to the original proprietors. The city has acted in good faith. It has inclosed, planted with trees and improved and embellished the ground dedicated, and thus maintained the purpose of the donor. Lots abutting upon the square have been purchased and built upon with reference to it. They have also been made more valuable by this open ³²⁶ ground in front of them. A court of equity has the right to enforce the execution of the plainly declared trust, either upon the application of the owners of lots abutting upon the square, or upon the application of the city, the trustee. . . . The square is valuable property, intended for the use of the public and appurtenant to the estates of the abutting lot owners, and the trustee must be permitted to preserve it for the expressed and intended purposes of the trust. . . . In *Price v. Thompson*, 48 Mo. 361, the trustees of the town were about to open a public park, and run streets through it. The original owner of the land, upon the plat of the town, designated four acres as a park. The language of the statute in Missouri, in declaring the effect of the plat, is identical with our own. The court enjoined the trustees, and held that the park should ever remain public, and in the condition in which it was donated." By the language used in the case of *City of Jacksonville v. Jacksonville*

Ry. Co., 67 Ill. 540, this court indorsed the doctrine of the case of Price v. Thompson, 48 Mo. 361, to the effect that the running of a street through a public park is a misuse of the land embraced in the park, and a diversion of the same from the purposes for which it was originally dedicated. The doctrine of this case is precisely applicable to the facts in the case at bar.

In *City of Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927, 38 L. R. A. 849, it was held that, where the intention that a certain square should forever remain an open space had been expressed on the plat, or even in contemporaneous certificates, the village trustees could not lawfully appropriate it to any other public use, and it was there said: "It would have been an abuse of the trust reposed in them that the courts would not hesitate to control, that the property might be preserved for the uses intended by the donors." And it was also said in that case that "it is only where the dedication of the property as public ground is an unrestricted dedication to public use that the city or legislature may ³²⁷ designate the uses to which it shall be put." Such is the distinction between the case of *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 25, and the cases of *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, and *Village of Princeville v. Auten*, 77 Ill. 325. In the case at bar, there was no unrestricted dedication of the premises in controversy to such general public use as might include any public use, but the dedication of it was restricted to the purposes of a park, and the extension of a public highway through it would be a diversion of it from the original purpose for which it was dedicated.

It is established by the authorities referred to that, where property is consecrated to public use by common-law dedication of the owner, the municipality, within whose borders the premises are situated, takes it, as trustee for the public, for the special uses designated by the dedicator. Here the uses for which the premises in controversy were dedicated were for the purposes of a public park and common, and for the recreation and amusement of the public. These uses were not only declared by the dedicator, but they were assented to by the village, and established by the various decrees in the suits instituted by it, as above referred to. It results that the village cannot employ these premises or any portion of them for any additional purpose, such as putting a highway through them. The construction of such a highway across them is not devoting the

same to the purposes of recreation and amusement. Moreover, such a highway is not necessary to reach the park, which can be done through other roadways designated upon the original plat or map.

A distinction is to be made between cases where a public square is dedicated without restriction and cases where the dedication is restricted to a particular purpose. In the former case, any reasonable public use may be made of the square, but in the latter it must be devoted to the particular purpose indicated by the dedicator. ³²⁸ Where land is dedicated for a public park and common, it cannot be said that the construction of an elevated driveway, amounting in fact to nothing more than an approach to a railroad track, and only a little over one hundred feet long, is an act which amounts to keeping the park open for purposes of recreation and amusement. A distinction is also to be observed between cases where the facts show that a public park has been created and established by a municipality under statutory provisions and cases where the land has been dedicated for the purposes of the park by the original owner thereof. A pleasure driveway may be a legitimate feature of a public park created and established by a municipality, but in a dedicated park it is always a question of the intention of the donor. The latter class of parks cannot be cut up at the pleasure of municipal bodies, or by virtue of any statutory authority. The provisions in the statute in relation to parks, to which counsel for appellant refer, clearly relate to parks, created by a municipality or park commissioners, and not to parks dedicated at common law. Several cases are referred to by counsel, where a board of park commissioners are expressly given by statute exclusive powers over parks, and vested with absolute discretion to improve and maintain the same, as in their judgment may seem proper; in such cases, the board cannot be enjoined by a taxpayer on the ground of improper expenditures of public moneys from constructing speedways or other kinds of pleasure driveways: *Holtz v. Diehl*, 26 Misc. Rep. 224, 56 N. Y. Supp. 841. Such cases, in which parks are created under statutory authority, and park commissioners have the fullest power to regulate the use of the park, and to ornament and to do anything that they choose in their discretion with reference to it as a park, have no application to the case at bar, where the park was dedicated as such by the original owner of the land, and where the purpose of the dedication, as indicated by the owner, must be carried out.

³²⁰ 3. It is further claimed on the part of the appellant that the present bill will not lie upon the alleged ground that appellees have failed to show any damage to their property by reason of the construction of the proposed driveway over the park.

There is evidence tending to show that there would be special damage and injury to the lots of appellees by the misuse of the park in the manner proposed. But if this were not so, we do not deem it necessary that damage or injury of any kind must be shown, in order to justify a suit of this character. Appellees, as abutting property owners, are entitled, under the circumstances of this case, to an injunction restraining the village from violating its duties as trustee and perverting the purposes of dedication. It has been held that a bill or suit may be maintained by an individual in respect to a public street or highway where there is a special trust in favor of an adjoining property holder, as well as where there is a special injury: *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370. Where privileges of a public nature, and yet beneficial to private estates, are secured to proprietors contiguous to public squares or other places dedicated to public uses, equity will afford a remedy by injunction: 2 *Story's Equity Jurisprudence*, sec. 927; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

In *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866, it was held that, after the dedication of a block in a village to the public for a park, and the sale and conveyance of lots on the faith of such dedication, the original proprietor, though still holding the legal title to the block dedicated, would not be allowed to divert his trust by mortgaging the property, and that, if he did mortgage the property to parties having notice of the public interests therein, a court of equity would set the same aside at the suit of the corporate authorities and lot owners interested; and it was there said (page 72, 118 Ill.; page 871, 6 N. E.): "A court of equity has jurisdiction to entertain the bill filed in this case. As a foreclosure of the trust deed would probably ³³⁰ result in the ownership of the 'park' by private parties, there was a threatened perversion of the trust upon which the property was held. Equity will interpose to prevent the perversion of a trust: *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540. Again, the evidence shows a threatened nuisance tending to deprive appellees and others of the full and free use of this park, as they were entitled to have it used. This is a well-recognized ground for equitable inter-

position: *Zearing v. Raber*, 74 Ill. 409. . . . Small and Hubbard, as residents of the village, have a common interest with each other and with the village itself in preventing any obstruction to the use of the public square for the purposes of a park. . . . They are, therefore, properly joined with the village as complainants."

In *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255, which was a suit to enjoin the proprietors, who dedicated the land to public use, from appropriating to private use a square included in the dedication, the court say: "It sufficiently appears that the plaintiff is one of the inhabitants of the town, living and holding property contiguous to the square, the value of which is affected by the dedication. He is, therefore, not a volunteer assuming to protect the rights of others, but entitled to this remedy for the protection both of his individual and of his common interests": *Davenport v. Buffington*, 1 Indian Ter. 424, 45 S. W. 128.

Under the authorities thus referred to the present appellees had a right to file the present bill for an injunction, inasmuch as a special trust existed in the village of Riverside in their favor as adjoining property holders. They are seeking here to prevent the perversion of a trust, and upon that ground equity will interpose in their favor.

The decree of the superior court of Cook county is affirmed.

In the Subsequent Case of Lowery v. City of Pekin, 210 Ill. 575, 71 N. E. 626, it was held that a lease by a city granting the exclusive use of a portion of a dedicated highway for a purpose inconsistent with its use as a highway is ultra vires and void, and such city, if it repossesses itself of the tract of land, is not estopped to raise the defense of ultra vires to an attempt to enforce rights under such lease.

If a Person Plats Land setting apart certain portions thereof as streets, and sells lots with reference to such plat, he irrevocably dedicates the land designated thereon as streets, squares, or commons to the public for public uses: *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56, 34 South. 624. See, too, *Cook v. Totten*, 49 W. Va. 177, 87 Am. St. Rep. 792, 38 S. E. 491; *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230. The dedication of property to a public use is discussed generally in the monographic notes to *State v. Trask*, 27 Am. Dec. 559-570; *Whitesides v. Green*, 57 Am. St. Rep. 749-766.

Where a Public Park has been laid out and acquired by dedication or prescription, the owners of abutting property acquire a special right in the continuance of the park, of which they cannot be deprived except by due process of law: *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332, 86 N. W. 882, 54 L. R. A. 473. They may enjoin the city from using the park for purposes not intended by the terms of the dedication: *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927, 38 L. R. A. 849.

MASON v. ODUM.

[210 ILL. 471, 71 N. E. 386.]

JUDICIAL SALES—Setting Aside for Irregularities.—A judicial proceeding resulting in a sale of lands to pay a decedent's debts, which remains in full force and effect, will not be set aside after many years, in favor of the heirs, for irregularity except when equity requires it, even though no statute of limitations has run. (p. 181.)

JUDICIAL SALES—Presumption of Jurisdiction.—Lapse of Many Years after an administrator's sale, and possession taken thereunder, raises the presumption that jurisdiction of the person of the defendant was acquired by the court ordering the sale, and that it acted within its jurisdiction and proceeded according to law. (p. 181.)

JUDICIAL SALES.—Purchase by an Administrator at His Own Sale is merely voidable, and if the price accounted for as the proceeds of the sale exceeds the reasonable value of the property the sale may be ratified by the heirs by acquiescence. (p. 181.)

JUDICIAL SALES—Purchase by Administrator—Adverse Possession.—If an administrator purchases land at his own sale, and takes and keeps the open, visible, and adverse possession thereof under a claim of ownership for over twenty years thereafter, this is a bar to a bill for partition by the heirs, who are under no disability. (p. 182.)

LACHES—Notice.—If the question of laches is involved, then facts which would put a person of ordinary prudence on inquiry will charge him with such notice as could have been obtained if such inquiry had been made. (p. 182.)

ADVERSE POSSESSION Against Heir.—If land is held in adverse possession for more than twenty years without color of title, an heir who fails to assert his right of entry within the statutory period allowed him after the disability of infancy is removed is barred of his right. (p. 183.)

O. H. Layman and Joplin & Spiller, for the appellant.

W. W. Williams and W. H. Hart, for the appellees.

474 **WILKIN, J.** As above stated, the bill as filed is for partition, entirely ignoring the proceedings in the county court to sell the premises to pay debts, and alleges no reason why that sale should be set aside. The decree rendered by the chancellor does not mention the sale in the county court and assigns no reason why it should be held null and void. It is insisted that after the sale by the administratrix to pay debts the county court was without jurisdiction to correct the orders, notice and deeds, and therefore such changes and corrections were null and void. Conceding this to be true, the original proceeding remained in full force and effect, and the sale would not be set aside, at the suit of the heirs, after a lapse of many years,

on account of irregularities or corrupt practices occurring at the sale, even though no statute of limitations had run, except in a case where equity required it: *Goodbody v. Goodbody*, 95 Ill. 456. And where ⁴⁷⁵ many years elapse after the sale and possession taken under the same, the presumption must obtain that jurisdiction of the person of the defendant was acquired by the court, and that it acted within its jurisdiction and proceeded according to law: *Robb v. Howell*, 180 Ill. 177, 54 N. E. 324. The rights of the appellant in no way depend upon the validity of the action of the county court in attempting to correct the alleged mistakes. The decree of the circuit court ordering partition only affects the lands in sections 12 and 13, which were properly described in the first county court proceeding, and in no way affects the lands in section 10, where the mistake was made.

It is next insisted by appellees that the sale to pay debts was void because the land was purchased by the administratrix. In reply, appellant claims that even though the sale was void, both appellees have been guilty of gross laches, and their cause of action, if any, has long since been barred by the statute of limitations. In reply, appellees insist that the defense of laches by reason of lapse of time and inaction of the party seeking relief will not be permitted where the party was in ignorance of the material facts connected with the transaction or of his right in relation thereto, and that there is no statute of limitations which will run against a trust and no lapse of time or delay in bringing a suit will defeat the remedy, provided the injured party was, during all the interval, ignorant of the fraud—citing *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, and *Middaugh v. Fox*, 135 Ill. 344, 25 N. E. 584. We have held in many cases that an administrator cannot lawfully purchase real estate at his own sale, the reason being to remove him from temptation and insure to the heirs a fair and impartial sale. But such a sale and purchase is not void, but only voidable: *Lagger v. Mutual Union Bldg. Assn.* 146 Ill. 283, 33 N. E. 946; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. And in case the purchase is made by an administrator or administratrix, and the price accounted for as the proceeds of sale exceeds the reasonable value ⁴⁷⁶ of the land, so that the estate gains instead of loses by the transaction, the sale is not only merely voidable, but may be ratified by the heirs by acquiescence: *Stickel v. Crane*, 189 Ill. 211, 59 N. E. 595. The evidence in this record shows that the land was

worth about five hundred dollars, and was purchased by the administratrix in fact for seven hundred dollars, she paying the estate that amount therefor. By her act the estate did not lose by the sale, but was benefited. Immediately after the sale she entered into the open and exclusive possession thereof and continued in such possession ever since. Even though the sale had been void, the open, visible and adverse possession under claim of ownership for over twenty years would be a bar to the bill for partition: *Littlejohn v. Barnes*, 138 Ill. 478, 28 N. E. 980; *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367.

We do not think the authorities cited by appellees as to the doctrine of laches and the statute of limitations are applicable to the facts in this case. There is no evidence of fraud or concealment on the part of the appellant. The appellee Hannah Odum was during all this time an adult. She was personally served with notice of the petition to sell lands to pay the debts of the estate. The deeds of conveyance were matters of public record, and she had full opportunity to investigate them if she saw fit, but for a period of twenty-four years she remained silent, taking no steps to protect her rights, if she had any, and thereby became guilty of such laches as will bar her from relief in a court of equity. Moreover, any claim she may have had in the lands has long since been barred by the twenty year statute of limitations, she being under no disability during the whole of the twenty-four years. The decree of the circuit court as to her was therefore clearly erroneous.

At the time the sale was made Richard Odum was an infant, some two years of age. He lived with his mother near this land until he was about fourteen years old, when he removed to the state of Nebraska. He resided there about fourteen years, reaching his majority February ⁴⁷⁷ 13, 1897. In 1899, he visited his grandmother, the appellant, and she testifies that she requested him to make an investigation of his father's business, which he refused to do. This he denies, but his testimony shows he then knew she was in possession of the land, claiming to own it. The bill was not filed until October, 1902, about six years after he became of age. We have held that where the question of laches is involved, facts which would put a person of ordinary prudence upon inquiry will charge him with such notice as could have been obtained if such inquiry had been made: *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074. All of the county court proceedings had been a matter of record for twenty-four years, and during six of these twenty-four years

Richard Odum was of age and had every opportunity to inform himself as to the true condition of affairs, and yet he neglected to assert the claim he now makes until this bill was filed. In the case of *Sloan v. Graham*, 85 Ill. 26, an administrator sold real estate to pay debts and at the sale purchased the land himself. The sale took place in 1853, and the purchaser immediately entered into possession and continued in possession until March 31, 1873, when a bill was filed to set the sale aside. One of the complainants, John R. Graham, was an infant at the date of sale but became of age July 20, 1867, and after becoming of age delayed the filing of his bill for over six years. It was held that it was his duty, under the statute, to file his bill within three years, and having failed so to do, his right of action was barred. In the proceeding to sell the land to pay debts in the case at bar Richard Odum was made a party defendant, represented by a guardian ad litem, giving the court jurisdiction of his person and also of the subject matter. He was therefore bound by the decree of sale, and although the sale itself was voidable, being made to the administratrix, a deed was executed to her properly describing the lands in sections 12 and 13, and she immediately entered into possession, and, as before stated, ⁴⁷⁸ has continued in such open, exclusive and adverse possession for more than twenty years. Richard Odum's right of action as to the lands in sections 12 and 13 was therefore also barred by his failure to bring his action within three years after attaining his majority, as required by section 8 of chapter 83: 2 Starr & Curtis' Statutes, p. 2620. His position, however, as to the lands in section 10 is different by reason of the misdescription in the proceeding to sell the land, and in the deed executed to appellant she acquired no color of title to that land, but she did enter into possession of the same at the time of the execution of the deed to her and has continued in possession of the same to the present time—more than twenty-four years prior to bringing the suit and more than six years since Richard Odum became twenty-one years of age. By section 9 of our statute of limitations, *supra*, it is provided: "If, at any time when such right of entry or of action upon or for lands first accrues, the person entitled to such entry or action is within the age of twenty-one years, . . . such person or anyone claiming from, by or under him or her, may make the entry or bring the action at any time within two years after such disability is removed, notwithstanding the time

before limited in that behalf has expired." Under this provision we think he is also barred as to the lands in section 10.

We are therefore of the opinion that the circuit court was in error in dismissing the appellant's cross-bill and decreeing partition under the original bill. Its decree will accordingly be reversed and the cause remanded, with directions to dismiss the original bill and grant the relief prayed in the cross-bill.

A Purchase by an Executor or administrator of his decedent's property is voidable, but not void, and the right to question its validity may be lost by laches: Shelby v. Creighton, 65 Neb. 485, 101 Am. St. Rep. 630, 91 N. W. 369; Gibson v. Herriott, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252; Melms v. Pabst Brewing Co., 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; Comegys v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245, 33 N. E. 899. A son who accepts his share of the proceeds of an executor's sale may thereby be estopped to deny the validity of the sale and the conveyance made in virtue of it: Meddis v. Kenney, 176 Mo. 200, 98 Am. St. Rep. 496, 75 S. W. 633.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

**INDIANAPOLIS AND GREENFIELD RAPID TRANSIT
COMPANY v. FOREMAN.**

[162 Ind. 85, 69 N. E. 669.]

APPEAL AND ERROR—Joint and Separate Exceptions.—If two defendants jointly and separately demur to each paragraph of the complaint, and jointly and separately except to the overruling of the demurrers, an assignment of error by one of the defendants predicated upon such exception presents the question on appeal of the sufficiency of the complaint. (p. 187.)

FELLOW-SERVANTS—Negligence.—An Employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking. (p. 188.)

FELLOW-SERVANTS—Railway Employé Riding Home.—An employé engaged in common labor on the track of an interurban railway is, while being transported to and from his work, a fellow-servant with those in charge of the passenger-car in which he rides. (p. 190.)

FELLOW-SERVANTS—Negligence—Pleading.—Allegations in the complaint, in an action by a railway employé for injuries sustained while being transported from work, which are mere conclusions of the pleader, cannot control special facts alleged which show that the plaintiff was a fellow-servant with those in charge of the car. (p. 190.)

FELLOW-SERVANT—Knowledge of Incompetency—Pleading. In an action for injuries sustained through the negligence of a fellow-servant, the complaint is insufficient if it fails to negative the plaintiff's knowledge of the fellow-servant's incompetency; and an allegation that the plaintiff was injured without fault or negligence on his part does not take the place of averments showing that the risk of such incompetency was not knowingly assumed. (pp. 190, 197.)

FELLOW-SERVANTS—Statutory Liability.—Under the second subdivision of the Indiana employers' liability act, it is necessary, in order to make a good complaint against a railway corporation for the negligence of a coemployé, to allege that the complaining employé

was, when injured, conforming to the order or direction of some person in the service to whose order or direction he was bound to conform. (p. 192.)

FELLOW-SERVANTS—Switch-tender—Statutory Liability.—The fourth subdivision of the Indiana employers' liability act creates no liability for injuries to a railway employé caused by the negligence of persons in charge of a switch. (p. 193.)

STATUTES.—One Who Seeks the Benefit of a Statute must, by averment and proof, bring himself within its provisions. (p. 193.)

FELLOW-SERVANTS—Knowledge of Incompetency—Pleading.—In an action for injuries sustained through the negligence of a fellow-servant, the averments of want of knowledge on the part of the employé of the coemployé's incompetence must be as broad as the allegation of knowledge on the part of the employer. (p. 194.)

PLEADING.—Facts, not Conclusions, must be averred; and they must be pleaded directly and positively, and not by way of recital. (p. 195.)

FELLOW-SERVANTS—Implied Knowledge of Incompetency. Implied knowledge of a fellow-servant's incompetency, such as could have been acquired by the exercise of ordinary care, has the same force and effect, in barring a recovery for injuries sustained by an employé, as actual knowledge. (p. 197.)

W. A. Brown, J. P. Walker and E. J. Binford, for the appellant.

M. E. Forkner, G. D. Forkner, E. T. Gasscock, Ephraim Marsh and W. W. Cook, for the appellee.

⁸⁷ **MONKS, J.** Appellee brought this action against appellant and the Kirkpatrick Construction Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence of said corporations. The defendants jointly filed a demurrer to each paragraph of the amended complaint, and each defendant filed a separate demurrer to each paragraph of the complaint. These demurrers, which challenged each paragraph of the complaint for want of facts, were overruled by the court, to which ruling the defendants "jointly and separately excepted." A trial of said cause resulted in a general verdict against appellee as to the Kirkpatrick company and in favor of appellee against appellant. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in favor of appellee.

⁸⁸ The errors assigned call in question the action of the court in overruling (1) the joint demurrer of appellant and said construction company to the amended complaint, (2) the separate demurrer of appellant to each paragraph of the amended complaint, and (3) appellant's motion for a new trial. The amended complaint is also challenged by an assignment that the

same "does not state facts sufficient to constitute a cause of action."

Appellee insists that appellant's assignment of errors predicated upon exception taken by appellant to the rulings on the demurrers to each paragraph of the complaint presents no question as to the sufficiency of the paragraphs thereof, citing *City of South Bend v. Turner*, 156 Ind. 418, 421, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396. It will be observed that in the case cited the exception was joint, while in this case the defendants "jointly and separately excepted." It is clear, therefore, that the case cited is not in point here.

The first paragraph of the amended complaint proceeds upon a common-law liability. Appellant was, on May 27, 1901, "a corporation owning and operating an interurban street railway extending from Irvington to Greenfield, in this state, and was a common carrier of passengers for hire. On said day appellee was an employé of appellant as a common laborer, and was engaged with divers others in constructing a spur from appellant's track to Spring Lake, a distance of three-fourths of a mile. Appellant had in use on said day a car known as a work-car, which had been and was used in carrying its employés to divers points along said road where they were engaged and employed by appellant in building, maintaining, and repairing its said line of road. After said day's work had been finished, at about 6:30 P. M., appellee, with divers other employés of appellant, entered said work-car on said spur for the purpose of being carried to Greenfield, where he resided. While he was in said car, and the same was standing on ^{so} a switch of appellant's road, one of appellant's passenger-cars in charge of its employés approached said switch from the west at a high and dangerous rate of speed, to wit, thirty miles per hour, and ran into and upon said switch and collided with said work-car and injured appellee." In addition to the averments in the first paragraphs of the amended complaint showing the above facts, there are other allegations showing that the collision and consequent injury of appellee were caused by the negligence and carelessness of appellant's employés in charge of said passenger-car in not obeying the rules of appellant.

It is also alleged in said first paragraph that "the work in which appellee was engaged was common labor upon the tracks of appellant, and had no connection with, nor was the same in any manner incident to or a part of the work or employment of said motorman or servants in charge of the passenger-

car; nor were the squad of laborers with whom said appellee was working as aforesaid, and who were with him in said work-car, in any manner connected or associated with the said servants of appellant in charge of said work-car or said passenger-car which collided with it; that appellee had no charge of said work-car or the operation thereof, but was simply a passenger thereon at the time of the accident." Appellee says that this "paragraph of the complaint proceeds upon a common-law liability," and that the same is sufficient, because it is alleged that his injury was occasioned by the negligence of other servants of the company, whose duties were not common nor in the same department with those of the appellee, citing *Fitzpatrick v. New Albany etc. Ry. Co.*, 7 Ind. 436.

It was held in the case cited and in *Gillenwater v. Madison etc. Ry. Co.*, 5 Ind. 339, 61 Am. Dec. 101, that a railroad company is liable to an employé for an injury occasioned by the negligence of other employés of the company where the duties of the latter, in connection with ^{so} which the injury happens, are not common or in the same department with those of the injured servant. Those cases, however, were overruled on this point in *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174, 183, 99 Am. Dec. 615, where it was said concerning said rule: "But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases, and it is now settled in this state that the employer is not liable for an injury to one employé, occasioned by the negligence of another engaged in the same general undertaking: *Ohio etc. Ry. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Wilson v. Madison etc. Ry. Co.*, 18 Ind. 226; *Slattery v. Toledo etc. Ry. Co.*, 23 Ind. 81; *Ohio etc. Ry. Co. v. Hammersley*, 28 Ind. 371. In *Slattery v. Toledo etc. Ry. Co.*, 23 Ind. 81, Worden, J., quotes, with approbation, from the decision in *Wright v. New York Cent. R. R. Co.*, 25 N. Y. 562, as follows: 'Neither is it necessary, in order to bring a case within the general rule of exception, that the servants, the one that suffers and the one that caused the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control.' To

the same effect is the case of *Manville v. Cleveland etc. Ry. Co.*, 11 Ohio St. 417, where it is said that "those employed in facilitating the running of the trains, by ballasting the track, removing obstructions, and those employed at stations, attending to switches, and other duties of a like nature upon the road, as well as those upon the trains, operating, may all be well regarded as fellow-servants in the common service."

In *Gormley v. Ohio etc. Ry. Co.*, 72 Ind. 31, a laborer, ⁹¹ whose duty was to assist in repairing the track, etc., while being carried to his work on a hand-car, was killed by a collision with a freight train. His death was occasioned by the negligence of the engineer in charge of the engine and said train. The court's attention was called to the cases of *Gillenwater v. Madison etc. Ry. Co.*, 5 Ind. 339, 61 Am. Dec. 101, and *Fitzpatrick v. New Albany etc. Ry. Co.*, 7 Ind. 436, and on page 33 it was said: "The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases: *Slattery v. Toledo etc. Ry. Co.*, 23 Ind. 81; *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Wilson v. Madison etc. Ry. Co.*, 18 Ind. 226; *Pittsburgh etc. Ry. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Sullivan v. Toledo etc. Ry. Co.*, 58 Ind. 26. These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule that an employer is not liable to one employé for an injury caused by another employé engaged in the same general undertaking, it is more fitting that the legislature be invoked to give a remedy, than that this court should undertake to introduce doubtful exceptions to a rule so clearly established." In *Evansville etc. R. R. Co. v. Barnes*, 137 Ind. 306, 310, 36 N. E. 1092, the rule as stated in *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615, is quoted with approval. The following cases are to the same effect: *Thacker v. Chicago etc. R. R. Co.*, 159 Ind. 82, 85, 64 N. E. 605, 59 L. R. A. 792, and cases cited; *Thompson v. Citizens' St. Ry. Co.*, 152 Ind. 461, 469, and cases cited, 53 N. E. 462; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Spencer v. Ohio etc. R. R. Co.*, 130 Ind. 181, 184, and cases cited, 29 N. E. 915; *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811, and cases cited; *Capper v. Louisville etc. R. R. Co.*, 103 Ind. 305, 2 N. E. 749; *Indiana etc. R. R. Co. v. Dailey*, 110 Ind. 75, 79, 80, and cases cited, 10 N. E. 631; *Sullivan v. Toledo etc. Ry. Co.*, 58 Ind. 26; *Woollen on*

Trial Procedure, secs. 1350, 1351; Beach on Contributory Negligence, sec. 331. It is clear under the cases cited that ⁹² appellee, an employé of appellant, engaged in common labor upon its track, was a fellow-servant with those in charge of the passenger-car.

It is a general rule in this state that employés, while being transported to and from their work on the cars of trains of their employers, are fellow-servants of those engaged in the same general undertaking, and if injured, while being so carried, by the negligence of a fellow-servant, the employer is not liable therefor: *Bailey on Masters' Liability*, 283, 360, 361, and cases cited; *Ohio etc. Ry. Co. v. Hammersley*, 28 Ind. 371; *Wilson v. Madison etc. Ry. Co.*, 18 Ind. 226, and cases cited; *Capper v. Louisville etc. R. R. Co.*, 103 Ind. 305, and cases cited, 2 N. E. 749; *Ohio etc. R. Co. v. Tindall*, 13 Ind. 366, 369, 74 Am. Dec. 259, and cases cited; *Gormley v. Ohio etc. Ry. Co.*, 72 Ind. 31; *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 675, and cases cited, 87 Am. St. Rep. 279, 62 N. E. 94; *Ewald v. Chicago City Ry. Co.*, 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12; *Gilman v. Eastern R. R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635; *Gillshannon v. Stony Brook R. R. Corp.*, 10 Cush. 228; *Ryan v. Cumberland Valley Ry. Co.*, 23 Pa. St. 384; *Vick v. New York etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36.

The allegation that the work appellee was engaged in doing had no connection with, nor was in any way connected with or incident to or a part of, the work or employment of the motor-man or servants in charge of the passenger-car, the allegation that he was simply a passenger on the work-car, and the allegation that appellant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, and are not admitted by the demurrer, and cannot control the special facts alleged which show that he was a fellow-servant of those in charge of the passenger-car: *Woollen on Trial Procedure*, sec. 1037.

It is true that if an employé is injured by the negligence of a fellow-servant who is incompetent, and this incompetency is the proximate cause of the injury, the employer is liable therefor if he knew, or could by the exercise of ⁹³ ordinary care have known, of such incompetency, and the injured employé was not guilty of any negligence contributing to his injury, and did not know, and could not have known, of such incompetency by the exercise of ordinary care. For if an injured employé has knowledge of the incompetency of his fellow-servant by whose

negligence he is injured, and enters the service with such knowledge, or continues therein after he obtains, or could by the exercise of ordinary care have obtained, such knowledge, he assumes the risks incident to such incompetency: *Lake Shore etc. R. Co. v. Stupak*, 108 Ind. 1, 5, 6, and cases cited, 8 N. E. 630; *Louisville etc. R. R. Co. v. Sandford*, 117 Ind. 265-269, and cases cited, 19 N. E. 770; *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20, 25, 27, and cases cited, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; *Indiana etc. R. R. Co. v. Dailey*, 110 Ind. 75, 81, 82, 10 N. E. 631; *Louisville etc. R. R. Co. v. Kemper*, 147 Ind. 561, 565-567, and cases cited, 47 N. E. 214; *Kroy v. Chicago etc. Ry. Co.*, 32 Iowa, 357; *Woollen on Trial Procedure*, secs. 1347, 1348, 1352. No such facts were alleged in said paragraph. It follows that the court erred in overruling the demurrer to the first paragraph of the amended complaint.

The second paragraph of the amended complaint alleges that appellee's injury was caused by the negligence of the employé in charge of the switch in opening the same so as to allow the passenger-car to enter thereon and collide with the work-car. Conceding, without deciding, that this paragraph sufficiently charges the incompetency of the person in charge of said switch, and appellant's knowledge thereof, it is not alleged that appellee did not know of such incompetency before the injury. For want of allegations negating such knowledge on the part of appellee the paragraph was clearly insufficient. It is alleged in said paragraph that appellee was injured "without any fault or negligence on his part," but this does not take the place of averments showing that the risk of the incompetency of the person in charge of the switch was not knowingly assumed as an incident of his service: *Louisville etc. R. R. Co. v. Corps*, 124 Ind. 427, 428, 24 N. E. 1046, 8 L. R. A. 636; *Peerless Stone Co. v. Wray*, 143 Ind. 574-576, 42 N. E. 927; *Cleveland etc. R. R. Co. v. Parker*, 154 Ind. 153, and cases cited, 56 N. E. 86; *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 676, 87 Am. St. Rep. 279, 62 N. E. 94; *Woollen on Trial Procedure*, sec. 1347.

The third paragraph of the amended complaint is founded upon the second subdivision of section 7083 of Burns' Revised Statutes of 1901, section 5206s (*Horner's Rev. Stats. 1901*), which provides "that every railroad . . . shall be liable for damages for personal injuries suffered by any employé while in its service, the employé so injured being in the exercise of

due care and diligence. . . . 2. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform."

In order to make a good complaint under this subdivision, it is necessary to allege, among other things, that the injured employé was conforming to the order or direction of some person in the service of the corporation to whose order or direction he was bound to conform, and did conform, and that while conforming to such order or direction he was injured by the negligence of the employé to whose order he was conforming: *Thacker v. Chicago etc. Ry. Co.*, 159 Ind. 82, 90-93, 64 N. E. 605, 59 L. R. A. 792; *Louisville etc. Ry. Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927; *American Rolling Mill Co. v. Hurlinger*, 161 Ind. 673, 69 N. E. 460.

It is alleged in said paragraph that on the 27th of May, 1901, appellee was in the service of appellant as a common laborer, and was directed by appellant to enter one of its cars, about one mile west of Philadelphia, for the purpose of being carried by appellant to the city of Greenfield; that appellee was bound to conform to the order and direction aforesaid, and that while on said car appellant negligently and carelessly ran one of its other cars into and caused the same to collide with the car which appellee had entered, whereby he was injured, etc. This paragraph is clearly insufficient. It is not shown that the employé ⁹⁵ by whose negligence he was injured was the one to whose order or direction he was bound to conform and was conforming when injured. Proof that appellee was injured while conforming to the order or direction of one employé, to whose order or direction he was bound to conform, and that his injury was caused by the negligence of another coemployé, who had no such authority, would sustain said allegations of the third paragraph, but would not make a case under said second subdivision of section 7083, *supra*.

In the fourth paragraph it is alleged that appellee, a laborer in the service of appellant, was directed to enter said work-car for the purpose of being carried to Greenfield, and was thence carried to a siding; that at the time and place "where said car was sidetracked the switch was placed by appellant in charge of one of its servants, who then and there negligently and carelessly operated said switch so that another car of appellant ran into the same and collided with great

force and violence with the car on said switch in which appellee was then riding, whereby he was injured, etc.; . . . that said servant of appellant in charge of said switch as aforesaid was at the time and place acting in the place and performing the duties of said appellant, and that appellee was then and there obeying and conforming to the order of appellant at the time of such injury." It is evident from what we have already said that the allegations of said paragraph are not sufficient to avoid the effect of the common-law rule that an employé cannot recover for injuries caused by the negligence of a fellow-servant. It is also clear from what was said in regard to the third paragraph that a cause of action is not stated under the second subdivision of section 7083 of Burns' Revised Statutes of 1901 of the employers' liability act of 1893.

Neither does the allegation concerning the negligence of the person in charge of the switch state a cause of action under the fourth subdivision of the employers' liability act, for no liability is created by said subdivision for injuries ⁹⁸ caused by the negligence of persons in charge of a switch: *Baltimore etc. R. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862. It is a well-settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions: *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 69 N. E. 460; *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 693, 52 N. E. 391, 54 N. E. 383; *Porter v. State*, 141 Ind. 488, 490, 40 N. E. 1061; *Weir v. State*, 161 Ind. 435, 68 N. E. 1023, 1024; *Goodwin v. Smith*, 72 Ind. 113, 116, 37 Am. Rep. 144; *Van Sickle v. Belknap*, 129 Ind. 558, 559, 28 N. E. 305; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 120, 121; *Potts v. Felton*, 70 Ind. 166, 169; *Blanchard v. Wilbur*, 153 Ind. 387, 392, 55 N. E. 99; *Massey v. Dunlap*, 146 Ind. 350, 354, 355, 44 N. E. 641; *Chicago etc. R. R. Co. v. Vert*, 24 Ind. App. 78, 81, 56 N. E. 139; *Baltimore etc. R. R. Co. v. Harmon*, 161 Ind. 358, 68 N. E. 589; *Toledo etc. R. R. Co. v. Long*, 160 Ind. 564, 67 N. E. 259; *Chicago etc. R. R. Co. v. Glover*, 159 Ind. 166, 169, 62 N. E. 11. Said third and fourth paragraphs wholly fail to bring appellee within any of the provisions of the employers' liability act of 1893.

The fifth paragraph of complaint is predicated upon common-law liability, and proceeds upon the theory that the injury complained of was caused by the negligence of a motorman in the service of appellant, who was a reckless and incompetent motorman, and was known to be such by appellant long before

the collision in which appellee was injured. It is not alleged in said paragraph that appellee had "no knowledge of the recklessness and incompetency of the motorman." Such an allegation is essential to the sufficiency of a paragraph predicated upon the incompetency of a fellow-servant. True; it is alleged that the passenger-car in charge of the motorman, "collided with the car in which appellee was riding, whereby appellee, without any fault or negligence on his part, and without any knowledge of the careless and reckless conduct of said motorman in operating his said car, was thrown with great force and violence forward in said car," and thereby injured. The allegation that appellee was "without any ^{or} knowledge of the careless and reckless conduct of said motorman in operating said car" means only that he had no knowledge of the careless and reckless manner in which the motorman was operating his car at the time of the collision. This is not equivalent to an allegation that appellee at and before the time of his injury had no knowledge of the recklessness and incompetency of the motorman: *Lake Shore etc. Ry. Co. v. Stupak*, 108 Ind. 1, 5, 8 N. E. 630. The averment of the want of knowledge on the part of the injured employé must be as broad as the allegation of knowledge on the part of the employer: *Peerless Stone Co. v. Wray*, 143 Ind. 574, 575-577, 42 N. E. 927. We have already shown that an allegation that appellee was without any fault or negligence on his part does not supply the place of averments showing that the risk of the incompetency of the motorman was not voluntarily assumed as an incident of his service.

It is alleged, as against appellant, in the sixth paragraph, that appellee was in the service of appellant constructing a spur-track from appellant's main line to Spring Lake, "and was and had been carried by defendant [appellant] from his home in Greenfield to and from his place of employment; that for the carrying of said plaintiff and his collaborators to and from the point aforesaid the defendant had furnished a work-car propelled by electricity; that it was so old and so negligently constructed and equipped that it could not be operated on the defendant's main line without great danger of collision with the other cars of the defendant running between stations, or delaying the same in making their schedule time; that at the close of plaintiff's day's work and on said day he was ordered, directed and invited by the defendant, by and through its authorized agents and employés, to enter into and upon

said work-car, to be carried from his place of employment to his said home in Greenfield aforesaid; that by reason ⁸⁸ of the said order, direction, and invitation of the defendant aforesaid, and directed and induced thereby, the plaintiff entered into and upon said car for the purpose of being carried as aforesaid to his said home aforesaid; that said car proceeded upon its course upon defendant's main track for some distance toward the said town of Greenfield, whereupon (by reason of its defective construction and equipment thereof) the defendant and its employes (were compelled to and did) run said car into and upon a sidetrack of the defendant connecting with its main line to permit an incoming car to pass the same, and while said car was standing upon said track, and while the plaintiff was lawfully and rightfully in and upon said car for the purpose of being carried to his home aforesaid, the defendant negligently and carelessly by and through the negligence of its motorman, officers, agents and employes in the control, management and direction of said cars and the switchman in charge of said switch, and by reason of its negligent and defective rules and mode of keeping knowledge of and directing its cars, run another car with a speed of thirty miles per hour into and upon said switch, and into and upon the said car in which the plaintiff was situated as aforesaid, and upon, into and against the plaintiff—all without any fault or negligence of the plaintiff in any particular whatever."

It cannot be held that said paragraph shows that appellant had failed to exercise ordinary care in establishing and promulgating its rules, or in the mode of keeping knowledge of and directing its cars. There are no direct averments to that effect. Moreover, said allegations are mere conclusions of the pleader stated by way of recital. Facts, not conclusions, must be averred; and they must be pleaded directly and positively. It avails nothing as against a demurrer to aver conclusions or to plead facts by way of recital: *Nysegander v. Lowman*, 124 Ind. 584, 590, 24 N. E. 355; *Weir v. State*, 161 Ind. 435, and cases cited, 68 N. E. 1023, 1024; ⁸⁹ *Roberts v. Lovell*, 38 Wis. 211, 215; *Bliss on Code Pleading*, 3d ed., sec. 318. In determining the sufficiency of said paragraph, therefore, we must eliminate the allegation in regard to "negligent and defective rules" and "mode of keeping knowledge of and directing their cars." If the negligent construction and equipment of the work-car and the alleged great danger of operating it on the main line were the proximate cause of the injury, the same

would be insufficient, because it is not alleged that appellee had no knowledge of the negligent construction and equipment of said work-car, and the consequent danger of collision with other cars. In other words, to be sufficient on the ground of the negligent construction, etc., of the work-car, the allegations must show that he has not assumed the risks incident to the defective construction of the work-car of which he complains. It is evident, however, that the proximate cause of appellee's injuries was the running of another car "into and upon said work-car," and not the negligent construction and equipment of said work-car. What is alleged in regard to the age and negligent construction and equipment of the work-car, and the danger of operating it on the main line, may therefore be disregarded.

Disregarding the conclusions, recitals and allegations mentioned, said amended sixth paragraph charges that appellee's injuries were caused by the negligence of those "in the control, management and direction of" the work-car and the car which ran into it. The persons in charge of said cars, as we have already shown, were, regardless of the names or titles by which they were designated, fellow-servants of appellee, and if appellee was injured by their negligence, as alleged, appellant was not liable therefor.

It is a well-settled rule in this state that an employé who knows, or by the exercise of ordinary care could know, of any defects or imperfections in the place, ways, machinery, appliances, tools, or other things about which ¹⁰⁰ he is employed, or the want of capacity or the negligent habits of a fellow-servant, and continues in the service without objection and without a promise of change, is presumed to have assumed the risks resulting from such defects or imperfections, or fellow-servant's want of capacity or negligent habits, and cannot recover for injuries caused thereby. The rule does not require that the employé search for latent defects in the ways, machinery, appliances, tools, or other things about or with which he works, or the hidden dangers of the place where he is engaged in the line of his duty, but it goes to the extent that he assumes the consequences resulting from such defects as are patent, and such as are known to him, and such as by the exercise of ordinary care he could discover: *Wabash R. Co. v. Ray*, 152 Ind. 392, 400, 401, 51 N. E. 920. It has been uniformly held, therefore, that in an action by an employé against his employer for injuries received while in his employment, a complaint, to

be sufficient, must allege that he had no knowledge of such defects or imperfections, or fellow-servant's want of capacity or negligent habits; and if he have such knowledge he must allege facts which show a sufficient reason for continuing in such employment: *Woollen on Trial Procedure*, secs. 1350, 1352, and cases cited; *Stone v. Bedford Quarries Co.*, 156 Ind. 432, 60 N. E. 35; *Hall v. Bedford Quarries Co.*, 156 Ind. 460, 60 N. E. 149; *Cleveland etc. R. R. Co. v. Parker*, 154 Ind. 153, and cases cited, 56 N. E. 86; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Consolidated Stone Co. v. Summit*, 153 Ind. 297, 299, 300, 53 N. E. 235; *Louisville etc. R. R. Co. v. Kemper*, 147 Ind. 561, and cases cited, 57 N. E. 214; *Peerless Stone Co. v. Wray*, 143 Ind. 574-577, and cases cited, 42 N. E. 927; *Boone on Code Pleading*, sec. 169. Under this rule none of the paragraphs of the complaint states facts sufficient to constitute a cause of action at common law.

While it is sufficient to allege in the complaint a want of knowledge on the part of the injured employé, to sustain such allegation the evidence must show that the injured ¹⁰¹ employé not only had no knowledge of the defect or imperfection in the machinery, appliances, tools, or other things about which he was employed, or of the fellow-servant's incompetency or recklessness complained of, but could not have had such knowledge by the exercise of ordinary care: *Consolidated Stone Co. v. Summit*, 152 Ind. 297, and cases cited, 53 N. E. 235. In an instruction to the jury, however, it is error to say that want of knowledge on the part of the injured employé will enable him to recover against his employer, for this limits the employé's assumption of risk to things of which he has actual knowledge. If he had such knowledge, or could have had by the exercise of ordinary care, he cannot recover. It is error, therefore, in instructions to the jury, to limit the injured employé's knowledge to actual knowledge; for implied knowledge, such as could have been acquired by the exercise of ordinary care, has the same force and effect as actual knowledge: *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 533-535, and cases cited, 53 N. E. 763; *Chicago etc. R. R. Co. v. Glover*, 159 Ind. 166, and cases cited, 62 N. E. 11. For this reason two of the instructions given to the jury were erroneous.

As none of the paragraphs of complaint states a cause of action under the employers' liability act of 1893 (*Burns' Rev. Stats.* 1901, sec. 7083), it is unnecessary to decide whether or not said act, or any part thereof, applies to street and inter-

urban railroads. For a discussion of this question, see *Sams v. St. Louis etc. R. R. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; *Savannah etc. Ry. Co. v. Williams*, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249; *Dresser on Employers' Liability*, sec. 80, pp. 349, 350, and cases cited. Other questions are argued, but as they may not arise on another trial of the cause they are not considered.

Judgment reversed, with instructions to sustain appellant's demurrer to each paragraph of the amended complaint.

A Railway Employé, while being transported to and from his work free of charge on the cars of the company, is, according to some authorities, a passenger: *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524, 38 L. R. A. 376; *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770, 25 L. R. A. 157; *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 83 Am. St. Rep. 284, 59 N. E. 60, 52 L. R. A. 26; *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398. According to other authorities, he is an employé: *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 87 Am. St. Rep. 279, 62 N. E. 94; *Ionnone v. New York etc. R. R. Co.*, 21 R. I. 452, 79 Am. St. Rep. 812, 44 Atl. 592, 46 L. R. A. 730; note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 97.

POTTER v. STATE.

[162 Ind. 213, 70 N. E. 129.]

HOMICIDE—Carrying Concealed Weapons in Violation of Law. If, while two men are engaged in a friendly scuffle, a revolver on the person of one of them is accidentally discharged, killing the other, the mere fact that the owner carried the weapon in violation of law does not render him guilty of the crime of involuntary manslaughter. (pp. 201, 202.)

W. E. Henderson and M. L. Clawson, for the appellant.

C. W. Miller, attorney general, C. C. Hadley, W. C. Geake and L. G. Rothschild, for the appellee.

213 JORDAN, J. Appellant was tried before a jury in the lower court, and a verdict was returned finding him "guilty of manslaughter as charged in the indictment." Over his motion for a new trial, the court rendered judgment on the verdict, assessing his punishment at imprisonment in the Indiana Reformatory for not less than two nor more than twenty-one years, and that he be fined and disfranchised. From this

judgment he appeals, and assigns, among other reasons, that the court erred in overruling his motion for a new trial.

The indictment upon which he was tried and convicted charged that William Potter on the tenth day of April, 1903, at the county of Marion, state of Indiana, "did then and there unlawfully, feloniously and involuntarily, without malice, express or implied, kill one Hurva Garnett, by then and there in a rude, insolent and angry manner, unlawfully and feloniously shooting at and against, and ²¹⁴ into the body of the said Hurva Garnett with a certain revolver, a dangerous weapon, which he, the said William Potter, then and there unlawfully had, loaded with gunpowder and leaden balls, concealed upon his person, he, the said William Potter, not then and there being a traveler, thereby mortally wounding the said Hurva Garnett, from which mortal wound he, the said Hurva Garnett, then and there died, contrary to the form of the statute," etc.

The undisputed facts established by the evidence are substantially as follows: Appellant, a young colored man about twenty-four years old, residing in the city of Indianapolis, was on the day of the homicide, which is shown to have been on some Sunday in the month of April, 1903, going to his home in said city. As he was passing along the street near the corner of Rhode Island and Locke streets, the deceased, a boy about eighteen years old, together with some other boys, was standing at the corner of said streets. Appellant and the deceased, as it appears, were friends, and well acquainted with each other, and at times past had been in the habit of engaging in "friendly scuffles." As appellant approached the corner of the streets in question he was engaged in tossing up a small ball; and, when he came up to the point where the deceased was standing, some friendly conversation or bantering occurred between them in regard as to whether appellant could hit him with the ball which he had been tossing. The talk or bantering between the parties in question appears to have led up to a friendly play or scuffle, during which a loaded revolver that appellant at the time was carrying concealed in his pocket, or somewhere about his person, was accidentally discharged, the ball therefrom passing through the clothing of appellant into the body of the deceased, from the effects of which the latter died.

Counsel for appellant contend that the verdict of the jury is contrary both to law and the evidence, and that the conviction of the accused cannot thereunder be sustained.

²¹⁵ Counsel for the state say in their brief: "This record presents a case which is somewhat novel in the annals of criminal jurisprudence in this state, if not in this country. The manner in which the deceased met his death, as shown by the record, was peculiar, to say the least; and whether appellant must suffer for the crime of involuntary manslaughter for circumstances created unintentionally, nevertheless unlawful, on his part, is the question presented for this court's consideration and solution."

Neither the facts as alleged in the indictment, nor as established by the evidence, constitute the crime of voluntary manslaughter. The pleader in drafting the indictment, however, appears to have at least attempted to charge appellant with the offense of involuntary manslaughter. As the indictment is not assailed in this court, we need not determine its sufficiency as to the charge of involuntary manslaughter, but simply treat it, for the purpose of this appeal, as presenting such a charge.

The crime of voluntary and involuntary manslaughter as defined by the statutes of this state is as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and upon conviction thereof, shall be imprisoned in the state prison," etc.: Burns' Rev. Stats. 1901, sec. 1981 (Horner's Rev. Stats. 1901, sec. 1908). The statute prohibiting the carrying of concealed weapons is as follows: "Every person not being a traveler, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed . . . shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars": Burns' Rev. Stats. 1901, sec. 2069 (Horner's Rev. Stats. 1901, sec. 1985). It is conceded, and properly so, that at the time of the homicide appellant was carrying the pistol in question in violation of the above statute. The question arises, then, Did carrying the weapon unlawfully at the time of the homicide, in view of the ²¹⁶ other facts in the case, render the accused guilty of the crime of involuntary manslaughter as charged in the indictment?

The question, under the circumstances, as counsel for the state assert, is certainly a novel one, within the "annals of criminal jurisprudence," and we believe that a search for authorities to sustain the judgment below, under the facts, will

be futile. The theory of the state in the lower court, as the case appears to have been placed before the jury under the evidence and instructions of the court, was that the carrying of the revolver concealed by appellant, in violation of the statute, was the commission of an unlawful act from which the homicide resulted. It is undoubtedly true, as a general rule of law, that a person engaged in the commission of any unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act. But before this principle of law can have any application under the facts in the case at bar, it must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute.

Section 2215 of Burns' Revised Statutes of 1901 prohibits, under penalty, any person from hunting birds or other species of game with firearms on Sunday. If appellant, instead of carrying the pistol in question concealed, had been hunting with the weapon on Sunday in violation of the above statute, and when so hunting he had accidentally discharged it and killed Garnett, who happened to be standing near by, could it, in reason, be asserted that his death was due to appellant's unlawful act of hunting on Sunday? Certainly not. If, while engaged in hunting, in violation of the statute, the pistol, through or by reason of the culpable negligence of appellant, had been discharged, and killed the deceased, the law, under such circumstances, would not have attributed his death to the unlawful act of hunting, but would have imputed it to such negligence. In fact, under such ²¹⁷ circumstances, the unlawful act of hunting would not be a factor in, or add anything to, the case. It would constitute nothing more than a separate and distinct offense.

An eminent author on criminal law says: "It is *malum prohibitum*, not *malum in se*, for an unauthorized person to kill game in England contrary to the statutes, if, in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized": 1 Bishop's Criminal Law, 8th ed., sec. 332. See, also, 1 East's Pleas of the Crown, 260; 2 Roscoe on Criminal Evidence, 800.

With equal reason and force it may be asserted that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act did not, during the scuffle

between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful. Of course the law exacts of all persons the duty of being exceedingly cautious and careful in the use of or the handling of firearms or other dangerous agencies: *Surber v. State*, 99 Ind. 71. In fact, as a general rule, the law has such a high regard for human life that it considers as unlawful all acts which are dangerous to the person against whom they are directed, no matter how innocently they may be performed. A person will not be permitted to do an act which jeopardizes the life and safety of another, and then, upon plea of accident, escape liability for a homicide involuntarily resulting from his reckless or careless act or conduct: *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777; *Gillett on Criminal Law*, 2d ed., sec. 502; 21 Am. & Eng. Ency. of Law, 2d ed., 191, and cases cited.

It is not charged in the indictment in this case that the homicide resulted from the reckless, careless or negligent manner in which appellant was using or handling the pistol at the time it was discharged. Consequently, under the ²¹⁸ pleading, even though the facts could be said to justify or sustain such a charge, the case is not brought within the rule of culpable negligence, as affirmed and enforced in *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777, wherein the defendant was charged in the indictment with having carelessly and negligently run a locomotive engine into a passenger-car, thereby killing a person who was a passenger thereon. It will be readily seen that, under the charge made by the indictment, the case at bar does not fall within that class of cases where the homicide is the result of culpable carelessness or negligence of the accused party in using or handling a dangerous weapon: 21 Am. & Eng. Ency. of Law, 2d ed., 191-195, and cases cited in footnotes.

Without further comment upon the question involved, we conclude that the conviction of appellant was wrong. The judgment of the lower court is therefore reversed, and the cause remanded, with directions to the court to grant appellant a new trial.

Unintentional Homicide in the commission of an unlawful act is the subject of a monographic note to *Johnson v. State*, 90 Am. St. Rep. 571-583.

KRAUSE v. BOARD OF SCHOOL TRUSTEES.

[162 Ind. 278, 70 N. E. 264.]

BUILDING CONTRACT—Destruction of Subject Matter.—A contractor is released from his undertaking to repair an old building and construct an annex thereto, where, after the work is practically finished and eighty per cent of the contract price received, the structure is so damaged by fire from lightning that completion is impossible without first restoring the old building; and this, although the contractor should have completed his contract before the fire, and although the contractee offers to restore the old building. (p. 211.)

BUILDING CONTRACT—Choice of Inconsistent Remedy.—Bringing an action against a building contractor for failure to proceed with his contract after performance has been rendered impossible by a fire is a waiver of a prior breach of his contract in not completing the building before the fire. (p. 211.)

BUILDING CONTRACT—Destruction of Subject Matter.—If a building on which the contractor has paid out more than he has received is accidentally destroyed by fire before completion, the payments made by the owner and put into the building, are treated as an execution of the contract pro tanto, leaving the loss to the owner. (p. 213.)

BUILDING CONTRACT—Destruction of Subject Matter.—A provision in a contract for the repair of an old building and the construction of an annex thereto, that the owner shall not be responsible for any loss or damage that may happen to the work, does not prevent the loss from falling on the owner, where the structure, when practically finished, is so damaged by fire from lightning that the completion of the contract is impossible. (p. 214.)

BUILDING CONTRACT—Destruction of Subject Matter.—The fact that if a contractor had completed a building without delay, the owner might have insured it, has no bearing on the obligation of the contractor to perform his contract after the destruction of the building by fire. (p. 215.)

BUILDING CONTRACT—Destruction of Subject Matter.—Where a building contract provides that eighty per cent of the work shall be paid for as it progresses, which is done, and that the balance shall be paid when the building is completed, there can be no recovery as to such balance, either on the contract or on a common count, if the building is destroyed by fire before its completion. (p. 216.)

W. T. Branaman, Marshall Hacker and O. H. Montgomery, for the appellants.

S. Stansifer, C. S. Baker and S. H. Barnes, for the appellee.

²²⁰ GILLETT, C. J. This suit was instituted by appellee to recover on a bond executed by appellants for the faithful performance of a building contract. Certain of the appellants, constituting the firm of John Krause & Co., filed a cross-complaint to recover for a balance unpaid under the contract,

and to this they added a paragraph on a quantum meruit. Issues were joined on the pleadings mentioned, and a trial resulted in a judgment in favor of appellee upon its complaint, and against said cross-complainants, on the issues tendered by them. Pursuant to request, the court found the facts specially. The findings are very long, and in the statement of the facts so found we shall not only summarize many of the findings, but shall omit matters which, for the purposes of this opinion, are irrelevant.

In October, 1898, appellee entered into a contract in writing with said John Krause & Co., whereby the latter agreed to furnish the materials for, and to erect and finish, an annex to a school building belonging to appellee, and to make certain improvements upon the latter building, for the sum of three thousand eight hundred and fifty-three dollars and thirty-five cents, "to be paid upon the completion of the work." Appellee agreed in said contract, in consideration of the agreements of said firm being strictly ²⁸¹ kept, that it would pay said sum to said firm, but provision was made in said instrument that, as the work progressed, estimates were to be furnished by the architect of materials provided and labor performed, on which eighty per cent of the value of said material and labor would be paid, on the presentation of said estimates, the amount so paid to be deducted from the final estimate which the contract provided for. The fifth subdivision of said contract was as follows: "The party of the first part [the school town] shall not be in any manner answerable, accountable or responsible for any loss or damage that shall or may happen to said work or any part thereof, or for any of the materials or anything used or employed in finishing the same." Appellee reserved the right in said contract to place in position the heating apparatus and furniture at such times as it saw fit. The specifications attached to the contract provided that all the work, when finished, was to be turned over perfect, complete, and undamaged in every particular; that the whole work was to be inspected as it went on, and was to be accepted by the owner and architect before a final settlement was made. The character of the bond is indicated above.

The building to which said annex was to be attached was a two-story brick structure, and the annex was of the same height. For a distance of forty-two feet the west wall of the old building was to be the east wall of the new structure. The

annex was so compactly and substantially joined to the old building as to constitute one building. One end of the lower sill or cord of the roof trusses was required to rest on said wall, and the roof plates of the new building were to be fastened to the roof plates of the other building. The halls of the two buildings were to be arranged so that they would be continuous. Krause & Co. were also required under their contract to do considerable work on the old building, such as excavating, putting in underpinning, building a concrete ²⁸² floor, raising the tower, and doing the mason work in connection with the installing of the heating apparatus. On July 24, 1899, said firm had progressed with its work until it would have cost but thirty-five dollars to complete the same, there being but one coat of paint and of varnish necessary to finish such undertaking; the value of the work done and materials furnished at that time, the court found to be but thirty-five cents less than the contract price. On the day aforesaid the old building was struck by lightning and thereby set fire to, and everything inflammable in both buildings was destroyed by such fire. As a result of the fire said common wall partially fell, and was so weakened that it had to be taken down. The remaining walls of the old building were also seriously injured. The court found that all that could have been done upon the old building after the fire, under said contract, was to build up the retaining walls in the furnace rooms to the floor line. It was further found that it would have been impossible for said contractors to build the roof of the annex, as provided for in the contract, without said common wall, and that without it the remainder of said structure, if built, would have been weak. With the exception of a few days' work done by two men during the week before the fire, no work had been done by said firm on said contract, according to the findings, after May 26, 1899. The court found that said firm could have completed its contract by June 15, 1899, and that it unreasonably and without excuse delayed the completion of said work. It is shown that appellee had advanced to said firm, prior to said fire, approximately eighty per cent of the contract price. No estimates had been made or demanded.

The concluding findings of the court show that after the fire appellee requested said firm to complete its contract; that the firm refused to do so for the assigned reason that the old building was not in such condition as to make such work possible; that appellee then offered to restore ²⁸³ the old build-

ing, so that the firm might complete its contract, but that the firm refused to agree to do so; that appellee then demanded that said firm pay back the money advanced on the work, which demand was refused.

The questions involved in this case are in many respects quite novel, at least so far as this court is concerned. The ancient case of *Paradine v. Jane*, Aleyn, 26, is often referred to in the discussion of the question as to whether a covenant will be discharged by a subsequent event, happening without the default of the covenantor, which renders performance impossible. That case was an action of debt to recover rent. The defendant answered that he had been dispossessed by an alien enemy, which had occupied the premises until after the lease expired. There was no answer as to one quarter. The court said: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, . . . there the law will excuse him; . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It will be seen that that case did not involve a question as to a covenant which it had become impossible to perform, since the defendant could pay rent, *modo et forma* as he had covenanted, notwithstanding the eviction.

We regard it as thoroughly settled that the words of a mere general covenant will not be construed as an undertaking to answer for a subsequent event, happening without the fault of the covenantor, which renders performance of the covenant itself not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject matter of the contract. Where performance is thus rendered impossible, the inquiry naturally arises as to whether there was a purpose to covenant against such ²⁸⁴ an extraordinary and therefore presumably unapprehended event, the happening of which it was not within the power of the covenantor to prevent. The tempest, for instance, may destroy that which must exist if performance of the covenant is to remain possible, and it would seem evident in such a case that it was not within the contemplation of the parties that the maker of the covenant should answer in damages for what he could in no wise control. But, on the other hand, a person entering into a charter-party might be answer-

able for delay caused by adverse winds, since it would be presumed that the parties contracted with such a possibility in mind: *Shubrick v. Salmond*, 3 Burr. 1637.

A well-known English writer on the law of contracts says: "By the modern understanding of the law we are not bound to seek for a general definition of 'the act of God' or vis major, but only to ascertain what kind of events were within the contemplation of the parties." And he further says upon the same point: "We cannot arrive, then, at any more distinct conception than this: An event which, as between the parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract": *Pollock on Principles of Contracts*, 361.

In *Hayes v. Bickerstaff*, Vaughan, 118, 122, it was declared that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such, for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.

The leading case upon the subject of subsequent events rendering performance of covenants impossible is *Baily v. De Crispigny*, L. R. 4 Q. B. 180. In that case a lessor had covenanted that neither he nor his heirs or assigns ²⁸⁵ would allow any building on a piece of land of the lessor's fronting the demised premises. A railway company purchased this land under the compulsory powers of a subsequent act of parliament, and erected a station upon it. It was held that the railway company, coming in under compulsory powers, whom the covenantor could not bind by any stipulation, was "a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into," and that therefore the covenantor was discharged. In the course of the opinion the court said: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to

have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham v. Barry*, 15 Com. B. (80 Eng. C. L.) 579, 619, 24 L. J. C. P. 106, a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation of the case put by Lord Coke in *Shelley's Case*, 1 Rep. 98 (c): 'If a lessee covenants to leave a wood in as good ²⁸⁶ a plight as the wood was at the time of the lease, and afterward the trees are blown down by tempest, he is discharged of his covenant,' because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy: See *Shepard's Touchstone*, 173. It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability."

In *Singleton v. Carroll*, 6 J. J. Marsh. 527, 22 Am. Dec. 95, it was held that the defendant was not liable upon his covenant to return a slave who, without the fault of the defendant, had run away. It was there said: "The true ground, however, generally, upon which, in such cases, to rest the defense of the covenantor, is, that the loss is not to be considered as provided against by a general covenant": See, also, *Pollard v. Shaffer*, 1 Dall. 210, 1 Am. Dec. 239, 1 L. ed. 104.

It has been questioned whether a fire caused by lightning is "an act of God," since fire can be prevented and also extinguished, but we need not consider this point. As to a general covenant, it is the law that the destruction of the subject matter of the contract, thereby creating a physical or natural impossibility inherent in the nature of the thing to be performed, whether occasioned by vis major or otherwise, will discharge the covenant, provided the event occurred without the fault of the covenantor.

The destruction before completion of a house which a contractor had covenanted to furnish materials for, and to erect and complete, will not relieve him, for performance is not thereby rendered impossible, since he may build a new house; but if the contract is to bestow labor or materials upon a particular building, it is obvious that its destruction prevents a compliance with the undertaking. Pollock states that it is the admitted rule of English law ²⁸⁷ that if a chattel perish without the vendor's default, performance is excused, although the promise is in words positive: Pollock on Principles of Contracts. 363. Chitty says: "But in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance become impossible from the perishing of the person or thing, that shall excuse such performance": Chitty on Contracts, 11th Am. ed., 1076.

In *Taylor v. Caldwell*, 3 Best & S. 826, where a music hall, engaged for concerts, had been accidentally destroyed by fire, it was held that both parties were thereby excused from the contract, because the general rule requiring absolute performance "is only applicable when the contract is positive and absolute, and not subject to any condition, express or implied." It was there also held that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor": See, also, *Womack v. McQuarry*, 38 Ind. 103, 92 Am. Dec. 306; *Jamieson v. Indiana etc. Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Lord v. Wheeler*, 1 Gray, 282; *Schwartz v. Saunders*, 46 Ill. 18; *Walke v. Tucker*, 70 Ill. 527; *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; *Niblo v. Binsse*, 1 Keyes (N. Y.), 476; *Brumby v. Smith*, 3 Ala. 123; *Cook v. McCabe*, 53 Wis. 250, ²²⁸ 40 Am. Rep. 765, 10 N. W. 507; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Hall v. School Dist.*,

24 Mo. App. 213; Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271; Platt on Covenants, 582; 9 Cyc. Law & P. 631, and cases cited.

The case of *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667, 12 L. R. A. 571, is quite in point. The court in that case, by Knowlton, J., said: "The fundamental question in the present case is, What is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the risk of the defendant, or was the plaintiff to have a like interest, as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials toward the erection of a house on land of the plaintiff, toward the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stonework, brickwork, painting and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that ²⁸⁹ the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract."

Counsel for appellee attach much importance to the fact that under the findings of the trial court the firm of John Krause & Co. had full opportunity to perform its contract before the fire occurred. It is insisted that this case does not fall within the

general rule, because some of the authorities proceed on the supposition that the reason for nonliability upon the part of the covenantor rests on the fact that the other party impliedly covenants that the premises shall remain in condition for a sufficient length of time to permit the promisor to perform his contract. It may well be said, as we have seen that Mr. Chitty states, that a condition is implied that if the performance becomes impossible from the perishing of the person or thing that shall excuse performance. Such a construction would be a fair example of the doctrine, laid down by one of the old writers, that "constructions are to be with equity and moderation, to moderate the rigor of the law": *Grounds of Law and Equity*, 38 ca. 49. We think that the case is one for the application of the rule declared by Lord Bacon, that "general words are restrained according to the nature of the thing or the person": *Bacon on Max. Reg.* 10; *Wharton on Legal Maxims*, 207. We fail to perceive why the covenantor should be charged with a breach that had nothing to do with the impossibility, and we cannot understand how the covenantor can be relieved upon performance becoming impossible before breach, on the theory that the covenantee had violated his implied ²⁹⁰ undertaking that the premises should continue in a fit condition, where it was impossible for him to prevent the happening of the event. The view that what is made an excuse for the covenantor is to be treated as a breach by the covenantee has been exploded by *Appleby v. Myers*, L. R. 2 C. P. 651.

The breach of contract on the part of the firm, set out in the trial court's findings, had nothing to do with the burning of the building. As observed in *Pollard v. Shaffer*, 1 Dall. 210, 1 Am. Dec. 239, 1 L. ed. 104, the property would have alike perished in the hands of the other party. The firm had proceeded to a point where the undertaking lacked but little of completion, and after the fire, when a demand to restore the work was made, the answer that performance was impossible was as sufficient, since the firm was not to blame for the destruction of the building, as it would have been had the fire occurred before the breach relied on.

Appellee's complaint does not proceed on the theory that the prior delay was a breach. The theory of that pleading is that the breach lay in the failure to proceed with the execution of the contract after the fire. The pursuit of said firm on the latter ground was a waiver of the prior breach, since the two theories

are diametrically opposed to each other. If the position were taken that the delay was a breach which appellee had taken advantage of to terminate the right of performance and to seek damages on the contract, the very assuming of that position involves the view that appellee had devolved upon it the ownership of the building in its then state, together with the responsibility of ownership under the rule *res perit domino*, thus limiting the damages to the cost of completion, or thirty-five dollars. But this breach had to be passed over, in order that it might be asserted that said firm should have proceeded with the work after the fire,²⁹¹ and with the assumption of the latter position the prior breach ceased to be a factor in the case.

We do not think that the rights of the parties were changed by the offer of appellee to restore the old building. The offer was made for the purpose of changing legal rights. There is no equity in a case of this kind, where the contractors have expended more money than they received in the execution of the contract. There must be a loss to some one. As observed by Lord Ellenborough, in *Barker v. Hodgson*, 3 Maule & S. 267, "the question is, On which side the burden is to fall." When the said firm entered into the original contract, the old building was standing, and it had a right to proceed presently with its contract. Appellee has no equity to demand that said firm carry out its contract after waiting until the old building can be restored, or that said firm accommodate itself to a new undertaking which would be different from the particular work which it obligated itself to do.

There have been decisions to the effect that substantial performance of covenants will be required where exact performance has become impossible. This proposition is no doubt true, as a general rule, especially in equity: *Eaton v. Lyon*, 3 Ves. Jr. 690. If the essence of an undertaking can be performed, that will be required. Thus, if a man covenants to build and complete a house by a certain day, the existence of the plague will excuse him, but he will be required to perform his undertaking afterward: *Bacon's Abridgment*, "Conditions" (Q). But the particular class of cases to which our inquiries relate seem to be distinguishable, in that such cases proceed on the theory that the covenantor did not, presumptively, by his general words, contract against that which afterward rendered performance impossible, if caused by the *vis major* or the loss or destruction of the subject matter. If he did not covenant against such possibilities, there is no basis for requiring

~~see~~ him to perform as near as may be. Lord Coke states, in his note to Shelley's Case, 1 Rep. 98 (c), that if a lessee covenants to leave a wood in as good a plight as it was at the time of the lease, and the trees are blown down by tempests, "he is *discharged* [our italics] of his covenant, quia impotentia excusat legem," and this was said, as pointed out in Pollard v. Shaffer, 1 Dall. 210, 1 Am. Dec. 239, 1 L. ed. 104, although it was obvious that the lessee might have planted new trees or rendered damages in lieu of those which had fallen.

It seems to us that if the covenantee has any remedy, where a particular building is accidentally destroyed, it must be in *assumpsit*, to recover, *ex æquo et bono*, for advancement in excess of expenditures, if any; but where, as here, the contractor has paid out more than he has received, we think that the payments made, which have gone into the property, must be treated as an execution of the contract *pro tanto*, leaving the rule to prevail, *res perit domino*: See *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10. C. P. 271.

Another consideration must be borne in mind with reference to the asserted obligation of the firm to rebuild if appellee restored the old building, and that is that appellee was not under a corresponding obligation to rebuild for the accommodation of said firm. Suppose that the fire had occurred before the work on the annex had progressed to any considerable extent, would the school town have been required to restore its building, that the firm might avail itself of its contract? Obviously not. The occurrence of a fire which practically destroyed the original building put such a different aspect on the face of things that it would not be said that it was within the contemplation of the parties, when they entered into the contract, that if a fire occurred the old building should be restored. The observations of the court in *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. ~~293~~ 654, 27 N. E. 667, 12 L. R. A. 571, are quite to the point upon the matter now under consideration. "It seems very clear," said the court in that case, "that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stonework, brickwork, painting and plumbing for another house of the same kind. The plaintiff might have answered, 'I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed

without my fault, I am under no further obligation. If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part toward the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials toward the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of": See, also, *Board etc. v. Louisville etc. Ry. Co.*, 39 Ind. 192, 200.

It is contended by counsel for appellee that the provision of the contract that the school town "shall not be in any ~~294~~ manner answerable, accountable or responsible for any loss or damage that shall or may happen to said work or any part thereof," amounted to a special provision which guarded against any implication that would leave appellee to bear any part of the loss or damage. We fail to apprehend how this provision, designed as a shield, can be converted into a sword. So far as the principal action is concerned, no one is endeavoring to hold appellee "answerable, accountable or responsible for any loss or damage." In any event, it cannot fairly be contended that this provision made said firm responsible for the integrity of the old building. As it was the destruction of the building which belonged to appellee that made performance impossible, the special provision under consideration did not extend to such a case. As against such a contingency, the contract wholly failed to provide.

There is even less of merit in the contention that if said firm had completed its contract without delay, appellee might have insured against fire. The latter had an increasing measure of risk during the progress of the work, and it was entirely optional with it whether it would insure against such risk. We

cannot, however, admit that the mere right or privilege of entering into a collateral contract of indemnity can have anything to do with the construction of the original covenant to build.

We now address ourselves to a consideration of appellants' cross-complaint. The contract provided for the performance of a specific and entire work, for a consideration, as to the portion thereof now in dispute, which was to be paid upon the completion of the building. The firm had reached a point where it was not entitled to any further money until it had completed its contract. To this extent, at least, the contract was unapportionable, and the performance of the whole work was a condition precedent to a recovery upon the special contract: 1 Addison on Contracts, 400. There could be no recovery upon this ²⁹⁵ contract, because it was unperformed, and the question as to the right to recover on a common count must depend upon where the loss must fall.

In respect to a substantially like agreement relative to chattels, Judge Story says: "Suppose there is a contract to do work on a thing by the job (as, for example, repairs on a ship), for a stipulated price for the whole work, and the thing should accidentally perish, or be destroyed, without any default on either side, before the job is completed, the question would then arise, whether the workman would be entitled to compensation pro tanto for his work, and labor done, and materials applied, up to the time of the loss or destruction. It would seem that, by the common law in such a case (independent of any usage of trade) the workman would not be entitled to any compensation; and that the rule would apply, that the thing should perish to the employer, and the work to the mechanic": Story on Bailments, 9th ed., sec. 426b.

The subject under consideration received an exhaustive consideration in *Appleby v. Myers*, L. R. 2 C. P. 651. That was a case stated by consent without pleadings. The contract was to install a steam boiler, engine, etc., in a building belonging to defendant for a consideration to be paid on the completion of the work. The building was burned before the work was finished. The court said: "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither." It was also pointed out by the court that there was nothing illogical in holding that the plaintiffs were not entitled to pay, since, if the accidental fire had left the de-

fendant's premises untouched, and had only injured a part of the work of plaintiffs, they would have been required to do that part over again to fulfill their contract to complete the whole.

²⁹⁶ Pollard v. Shaffer, 1 Dall. 210, 1 Am. Dec. 239, 1 L. ed. 104, was a suit on a covenant to deliver up demised premises at the end of the term in good order and repair. Plea, that the British army had forcibly taken possession of the premises and held the same until the term had expired, and that during said time said army had committed the waste complained of. M'Kean, C. J., in concluding an opinion well worth the perusal in connection with this case said: "I am of opinion that the defendant is excused from his covenant to deliver up the premises in good repair, on the 1st of March, 1778: 1. Because a covenant to do this, against an act of God or an enemy, ought to be special and express, and so clear that no other meaning could be put upon it; 2. Because the defendant had no consideration, no premium for this risk, and it was not in the contemplation of either party. And lastly, because equality is equity, and the loss should be divided—he who had the term will lose the temporary profits of the premises, and he who hath the reversion will bear the loss done to the permanent buildings."

The rule *res perit domino* is very influential in all cases of this general character, and the only question is as to the application of the rule: See Story on Bailments, 9th ed., secs. 426, 426a. The following authorities support the view that the members of said firm cannot recover on their cross-complaint: *Brumby v. Smith*, 3 Ala. 123; *Siegel etc. Co. v. Eaton etc. Co.*, 165 Ill. 550, 46 N. E. 449; *Lumber Co. v. Purdum*, 41 Ohio St. 373; *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278; *Bishop on Contracts*, sec. 588. As applied to this case, we may well adopt the following, which we take from 15 American and English Encyclopedia of Law, second edition, 1090: "In a case of this nature, the defendant [owner] receives no benefit, and, if he is equally blameless and irresponsible for the accident by which the property is destroyed, why should not the law ²⁹⁷ leave the parties as it finds them, and let each suffer his own loss?"

We think that neither said firm nor the appellee was entitled to recover in this case. Judgment reversed, with directions to the trial court to restate its conclusions of law and to render judgment in accordance with this opinion.

The Performance of a Contract is excused where the continued existence of something essential to the performance is an implied condition in the contract: *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 45 Atl. 692, 49 L. R. A. 572. As to whether a building contractor is excused from his obligations under the contract by the destruction of the building before its completion, see *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667, 12 L. R. A. 571; and as to whether, in such a case, he is entitled to recover for the work done and materials furnished, see the monographic note to *Huyett & Smith Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 285-289.

JORDAN v. GRAND RAPIDS AND INDIANA RAILWAY COMPANY.

[162 Ind. 464, 70 N. E. 524.]

RAILWAYS—Infant Trespasser on Cars.—A boy of eight years of age who, without invitation or permission, climbs upon a box-car standing on a sidetrack to watch a sale of horses in the stockyards near by is a trespasser. (p. 220.)

RAILWAYS—Trespassers, Duty to Search Cars for.—A railway company is not required to search for trespassers on cars standing on a sidetrack before moving them. (p. 220.)

RAILWAYS—Trespasser.—To Render a Railway Company Liable to a trespasser, it must have knowledge of his situation in time to prevent the injury, or it must inflict the injury purposely or recklessly. (p. 220.)

RAILWAYS—Trespasser—Evidence of Invitation.—In an action for the death of a boy where he climbed upon cars standing on a sidetrack to watch a sale of horses in the railway company's stockyards, evidence of a sale there on a former occasion which attracted people to the vicinity is not admissible. (pp. 221, 222.)

E. E. McGriff and G. W. Bergman, for the appellant.

Allen Zollars and F. E. Jollars, for the appellee.

465 DOWLING, J. The complaint in this case was in two paragraphs; the first averring that the appellee willfully, purposely and intentionally inflicted fatal injuries upon the infant son of the appellant, by suddenly attaching a locomotive to two cars standing on a siding, on one of which appellant's son, a child eight years of age, with the knowledge of the appellee, its agents, and employes, was sitting or standing, and, without warning, putting the same in motion, thereby causing the child to leap or fall in an attempt to escape therefrom; and the second alleging that the child was killed by the negligence of the appellee, its agents, and employes, in so attaching the locomotive

and suddenly starting the cars without warning the child, ⁴⁶⁶ or giving him an opportunity to escape from the car. The cause was tried by a jury, and, at the conclusion of the evidence for the plaintiff, the court gave a peremptory instruction for a verdict for the defendant, which was thereupon returned. Over a motion for a new trial, judgment was rendered for the defendant.

The error assigned is the ruling upon the motion for a new trial. The alleged insufficiency of the evidence to sustain the verdict, the exclusion of certain evidence offered by the appellant, and the giving of the peremptory instruction were the reasons for which a new trial was demanded.

The facts material to a decision of the questions before us are these: On the day of the accident the appellee owned, and for some time before that had operated, on its own land, a main railroad track, two sidetracks, one of which was on the east side of the main track, and the other on the west side, all lying near together, and also a spurtrack running from the southwest end of the east sidetrack, in a southwesterly direction, to the property of the Haynes Milling Company. Appellee also owned certain lots inclosed by high board fences, adjacent to its main track and sidetracks, and about five feet from the east track, used as stockyards, in which horses and other domestic animals were temporarily kept for shipment, delivery or sale. On September 2, 1901, the day of the accident, after advertisement by posting, a public sale of wild horses from the west took place at these stockyards, and the lassoing, capture and management of the animals attracted some seventy-five or more persons, who stood or sat on cars on appellee's tracks, watching the men and horses. Among these spectators were several young boys. These persons could have been seen by the employes of the appellee while they were switching cars. Appellant's son, a boy eight years old, small in size, but of ordinary intelligence, strength and activity, was among them. With some fifteen or twenty other men and boys, to obtain a better ⁴⁶⁷ view of the yards, he climbed to the top of an empty box-car standing on the sidetrack near the sheds in the stockyards and overlooking them, and sat down on the roof of the car. The car was not attached to a locomotive, but, with two or three other cars, had been in the same place for several days. While these cars were so standing on the sidetrack, persons in charge of a locomotive engaged in switching cars at this point, and probably in the employment of the appellee, caused the said engine to be run

along and over the said main track, and near the place where the said sale was in progress, in full view of said place and of the persons on and about the cars who were watching the men and animals in the stockyards. Shortly afterward, during the same morning, the persons in charge of the said locomotive ran it upon the said east sidetrack, and coupled it to the empty box-cars on which the said men and boys, including appellant's son, were standing or sitting, without any previous notice of their intention to do so. When the engine approached the cars, some one shouted to the persons on the cars that the locomotive was coming, and that they had better get off. The engine was in full view of the men and boys on the cars, and was making considerable noise puffing steam and running over switches. When the coupling took place, the men and boys ran northward on the cars, and tried to get off. Some of them jumped on the stock sheds, a few children were taken off by their parents, and others climbed down. Appellant's son, who was on the third car from the engine, and another boy on the second car, were unable to get off, because of the number of persons who were jumping and climbing off. The former rose and stood on top of the car some four or five feet from its north end, and acted as if he intended to climb down, but fell off between the cars, and was run over and killed. The train was moving slowly, and he fell at the moment when the engine was stopped, and the cars "jarred back." He was shaken off. ⁴⁰⁸ The other lad descended the car ladder and reached the ground in safety. While the switching was going on, the conductor of the switching train was on the ground, and stood for several minutes near the corner of the stock sheds, watching the men and horses in the yards. He uncoupled one of the cars while the engine and its crew were switching on those tracks.

Counsel for appellant insist upon two main propositions: 1. That it appears from the evidence that the acts of the employes of the appellee which caused the death of appellant's son were done under such circumstances as evinced a reckless disregard for the safety of the child, and a willingness to inflict the injury, and therefore that the injury was a willful and an intentional one, for which the appellant was entitled to recover, even if the child was a trespasser on appellee's cars, and was guilty of contributory negligence; and 2. That the injury to and killing of the child were caused by the negligence of appellee's employes in failing to warn the child of his danger when the engine was coupled to the standing cars, and to give him time to escape,

the boy being of tender years and incapable of contributory fault.

It is manifest that the boy, although an infant in years, was a trespasser: *Udell v. Citizens' St. Ry. Co.*, 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799. It cannot be said that he was upon the top of the empty box-car by the invitation or permission of the railroad company. There was no proof that the appellee gave any invitation or license, express or implied, to anyone to get upon its cars for the purpose of looking over the fences and watching the men and animals in the stockyards. The sales took place inside the yards, and the persons attending them for the purpose of examining the horses or purchasing them were not outside the yards nor on the top of the cars. The men and boys on the cars were merely idle spectators, gathered by chance, and sustaining no relation to the railroad ⁴⁰⁰ company except that of trespassers upon its property. It was not proved that the employes of the appellee knew or had reason to believe that any person remained on the cars after the coupling to the locomotive took place. The law did not require them to search the cars for trespassers before moving them: *Udell v. Citizens' St. Ry. Co.*, 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799. The appellee, by its switching crew, was engaged in its proper and necessary business, which required that cars should be moved from point to point on its tracks with greater or less celerity. The lives of scores of travelers might have been jeopardized by delay in getting cars off sidings, and in failing to clear the main track of freight or other trains or cars, and rapidity in the performance of such work did not constitute negligence. The circumstances were not such as to authorize the inference that the trainmen must have seen and known that the child was in a situation of peril. All the cases hold that in order to render a defendant liable for an injury to a mere trespasser, he must have had knowledge of the situation of the trespasser in time to have prevented the injury, or that the injury was purposely or recklessly inflicted: *Louisville etc. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Indianapolis etc. R. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; *Krenzer v. Pittsburg etc. Ry. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220; *Palmer v. Chicago etc. R. R. Co.*, 112 Ind. 250, and cases cited, 14 N. E. 70.

The engine was in plain view of all the persons on the cars as it approached, and it was making a noise by puffing steam and by running over switches. Before it reached the cars near

the stockyards, the men and boys on the cars were warned by a volunteer that it was coming, and were admonished to get off the cars. All did so, except David Ray Jordan and Glen Kinsey, two small boys. After the coupling was made, the train moved off slowly, and one of the boys climbed down the car ladder in safety. Appellant's son was about to do the same thing when the sudden ⁴⁷⁰ stopping of the train caused him to fall off. The evidence does not show that the engineer and the other persons in charge of the train evinced any disregard for the safety of the child, either in making the coupling, or in moving or stopping the train. The child was sitting on the top of the third car back from the engine. The duty of the engineer and fireman required them to look forward along the track: *Pittsburg etc. R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 60 N. E. 576. It does not appear that they could have seen the boy if they had looked back over the train. The evidence fell far short of proving an intentional injury, or of establishing the fact of such a reckless disregard of the safety of the child as amounted to a willingness to injure him: *Palmer v. Chicago etc. Ry. Co.*, 112 Ind. 250, 14 N. E. 70; *Louisville etc. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Cooley on Torts*, 674; *Terre Haute etc. R. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719.

It is equally clear, for the reasons already given, that the appellee was not guilty of actionable negligence in failing to warn the child that the locomotive was about to be attached and the cars moved. The evidence was insufficient to charge the appellee with knowledge, express or implied, of the presence of the child on the car and in a place of danger. If the boy had been seen by the engineer or train crew on the top of the car before the train started, or while it was running, a different question would have been presented. But in the absence of proof that they did see him, or that they ought to have looked, and could have discovered him if they had done so, the appellee could not be held responsible for the accident.

2. The death of the child was almost instantaneous, and was caused by his fall from the top of the box-car under the wheels of a moving train. A particular description of the various injuries he received was not material, and the evidence of these injuries was properly excluded.

3. The court did not err in refusing to admit evidence ⁴⁷¹ of a sale of horses at the appellee's stockyards on a former occasion which had the effect of attracting boys and men to that

vicinity. Such evidence did not prove that the appellee invited or expected trespassers on its property, nor did a single occurrence of this character require the appellee to anticipate that its cars would be occupied by sightseers and that its ordinary business of moving its cars and trains on its tracks in that vicinity could not be carried on without special warnings to persons who might congregate outside of the stockyards.

4. As the facts proved did not make the appellee liable for the death of appellant's son, the refusal of the court to admit evidence of the occupation of the appellant and the value of his property, even if erroneous, was harmless.

Giving to the evidence for the appellant its full legal effect, and allowing every reasonable inference from the facts proved, we are of the opinion that it failed to establish the allegations of either paragraph of the complaint, and that it would not have supported a verdict in his favor. Had such a verdict been returned, it would have been the duty of the court to have sustained a motion by the appellee for a new trial on the ground of the insufficiency of the evidence. In view of the failure of the proof to support the complaint, the direction of the court to the jury to return a verdict for the defendant was necessary and proper.

Judgment affirmed.

A *Railway Company* is said to owe a trespasser no duty, except to do him no willful or wanton harm: *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381; *Nash v. Southern Ry. Co.*, 136 Ala. 177, 96 Am. St. Rep. 19, 33-South. 932; *Bjornquist v. Boston etc. R. R. Co.*, 185 Mass. 130, post, p. 332, 70 N. E. 53. But see *Polatty v. Charleston etc. Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750, 45 S. E. 932; *McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329; *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398; *Enright v. Pittsburg Junction R. R. Co.*, 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938, 53 L. R. A. 330. As to the duty of railway companies to ascertain the presence of trespassers, see *Catlett v. Railway Co.*, 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; *Oregon Ry. etc. Co. v. Egley*, 2 Wash. 409, 26 Am. St. Rep. 860, 26 Pac. 973.

CASES

IN THE

APPELLATE COURT

OF

INDIANA.

McCOY v. McCOY.

[32 Ind. App. 38, 69 N. E. 193.]

STATUTE OF FRAUDS—Exchange of Lands.—A statute prohibiting the enforcement of parol contracts for the sale of real estate applies with equal force to contracts for its exchange. (p. 226.)

STATUTE OF FRAUDS—Failure to Plead Written Contract.—If no written contract for the exchange of real estate is pleaded, it will be presumed that the contract is oral. (p. 226.)

STATUTE OF FRAUDS.—Part Performance of a Contract concerning real estate may take it out of the operation of the statute of frauds. (p. 227.)

DEED—Acceptance.—The Execution of a Mortgage by a grantee, on the land conveyed, shows an acceptance of the deed of conveyance. (p. 227.)

VENDOR'S REMEDIES—Estoppel by Election.—An unsuccessful suit by a vendor to set aside a sale of land for fraud does not, because of the inconsistency of the remedies, estop him from enforcing a vendor's lien. (p. 229.)

ELECTION OF REMEDIES—Actions not Inconsistent.—One who supposes he has more than one remedy is not deprived of all remedy because he first tries a wrong one which is not inconsistent with his true and effectual remedy. (p. 229.)

ELECTION OF REMEDIES is the Choosing between the different modes of procedure and relief allowed by law on the same state of facts, which modes may be termed coexisting remedies. (p. 229.)

CONTRACT—Enforcement by Third Person.—Where a third person is a beneficiary under a contract, he may maintain an action thereon without notice of acceptance or demand, and the commencement of an action is both acceptance and demand. (p. 230.)

CONTRACT for Benefit of Third Person—Consideration.—In an action on a contract by a third person who is a beneficiary thereunder, it is not necessary to aver that some consideration moved from him to either of the original contracting parties. (p. 230.)

J. K. Ewing and C. H. Ewing, for the appellants.

Cortez Ewing and J. F. Goddard, for the appellees.

³⁹ WILEY, P. J. Appellee James T. McCoy was plaintiff below, and appellants Curtis and Carrie McCoy and appellee Arabella McCoy were defendants. Appellee's complaint was originally in ten paragraphs, the seventh, eighth, ninth and tenth of which were dismissed. A demurrer to each of the others was overruled. Curtis McCoy answered in nine paragraphs, all of which were dismissed but the second and fourth. Appellee Arabella McCoy filed a cross-complaint, to which a demurrer was overruled. Appellants' first and second paragraphs of answer were held bad on demurrer. Trial by the court, and a general finding for appellee James T. on his complaint, and for the appellee Arabella on her cross-complaint. All of the rulings on the pleadings which were unfavorable to appellants are assigned as errors.

Curtis and Arabella McCoy are son and daughter of James T., and Carrie McCoy is the wife of Curtis. Appellee James T. contends that the record affirmatively shows ⁴⁰ that the finding and decree are based on the fourth and fifth paragraphs of the complaint, and hence the ruling on the demurrer to the other paragraphs is not available, even though they might not be good as against a demurrer for want of facts. We cannot concur in this contention. The several paragraphs of the complaint are substantially the same, and it does not affirmatively appear from the record upon which particular paragraph or paragraphs the court based its finding. We think it is proper for us to say, in view of the prolixity of the complaint before us, that there is no defensible reason or excuse for encumbering a record by so many paragraphs of complaint, when every fact relied upon and pleaded might properly have been grouped in one, and at most two, paragraphs. Such practice is not to be commended, and is not productive of healthful results.

In the first paragraph of complaint it is alleged that on December 12, 1896, appellee James T. McCoy was the owner in fee simple of a certain described tract of land, consisting of two hundred and thirty-nine and sixty-six one-hundredth acres; that on that day he sold and conveyed the same, by warranty deed, to appellant Curtis McCoy, for the agreed price of \$12,000, upon the following terms, viz., \$2,000 cash, \$1,000 to be paid by appellant Curtis to appellee Arabella McCoy, \$2,000

as an advancement by James T. to Curtis, and the conveying by Curtis to James T. of certain described real estate of the agreed value of \$7,000, which said real estate was to be conveyed free and unencumbered; that at the time the said Curtis agreed and promised to pay and satisfy a certain mortgage for \$2,000 on part of the real estate he was to convey to his father; that he tendered to James T. deeds of conveyance for said real estate purporting to convey the same free and unencumbered, which appellee James T. refused to accept until the said mortgage lien should be discharged; that the said Curtis refused to pay and satisfy said mortgage, and still refuses; that said real ⁴¹ estate has since been sold on a decree of foreclosure of said mortgage, and said Curtis has failed to pay the balance of \$7,000 of the purchase price of the real estate conveyed to him, and that the same is due; that, after the acceptance of the conveyance to him by appellee James T., the said Curtis, on March 6, 1899, conveyed and mortgaged said real estate to his wife and coappellant Carrie McCoy for the alleged sum of \$7,350, due three months from date; that when said mortgage was executed to her the said Carrie had full knowledge that her coappellant Curtis had failed and refused to pay appellees, James T. and Arabella the \$2,000 and \$1,000, respectively, which he agreed to pay as a part of the purchase price for the real estate conveyed to him, and that he had failed and refused to pay and discharge the encumbrance upon the real estate which he agreed to convey to his father, and also knew that the latter would not accept a conveyance thereof until said encumbrance was discharged. It is also averred that appellant Curtis has no other property subject to execution. The prayer of this paragraph is that appellee have judgment for \$10,000; that a vendor's lien for the same be declared; that said lien be declared superior to the mortgage of appellant Carrie; and that it be foreclosed against the real estate conveyed by James T. to Curtis.

The second paragraph is so similar to the first that we do not discover any material difference between them, and it is useless to restate its averments.

The third paragraph contains all the essential averments of the first, and some additional averments as to that part of the contract by which Curtis was to pay, as a part of the purchase money, \$1,000 to his sister. These additional averments are not essential in determining the sufficiency of this paragraph of complaint.

As to the fourth, fifth and sixth paragraphs, the most careful scrutiny has failed to disclose any substantial difference between them and the first. Counsel have not ⁴² pointed out any difference, and in their brief, and also in oral argument, they have urged the same objections to all.

The scope and tenor of each paragraph of the complaint is to obtain a decree to enforce a vendor's lien for unpaid purchase money. The facts upon which appellee bases his right to equitable relief are fairly well pleaded, and the demurrer questions their sufficiency.

The principal objection urged to the complaint, and we think the most important one, is that it affirmatively appears that the contract relied upon was in parol, and as it was for the exchange of lands was within the statute of frauds, and for that reason not enforceable. The statute relied upon by appellant in specific terms prohibits the enforcement of parol contracts for the sale of real estate: Burns' Rev. Stats. 1901, sec. 6629. The provisions of the statute apply with equal force to contracts for the exchange of real estate: Bradley v. Harter, 156 Ind. 499, 60 N. E. 139. Appellants' position is therefore impregnable, unless, from the facts pleaded, we can say the contract has been taken out of the statute of frauds; for as no written contract is pleaded the presumption is that it was oral: Langford v. Freeman, 60 Ind. 46; Goodrich v. Johnson, 66 Ind. 258; Carlisle v. Brennan, 67 Ind. 12.

Because a contract is, in the first instance, voidable under the statute of frauds, it does not necessarily follow that it cannot be enforced, for some subsequent act of the parties may vitalize it and take it without the inhibition of the statute. Thus it has been held that when that part of the contract for the sale of lands which is within the statute is executed by the vendor, by which he vests in the vendee title, thus securing to him that for which he contracted orally, and the deed is accepted by him, he is bound for the purchase money, for the promise to pay the purchase price is not within the statute: Stephenson v. Arnold, 89 Ind. 426; Arnold v. Stephenson, ⁴³ 79 Ind. 126; Day v. Wilson, 83 Ind. 463, 43 Am. Rep. 76; Sands v. Thompson, 43 Ind. 18, 22; Huston v. Stewart, 64 Ind. 388, 395; Schierman v. Beckett, 88 Ind. 52. This is not an action for specific performance, but to enforce a vendor's lien for purchase money where the vendor has in fact parted with his title, which he agreed orally to convey.

Counsel for appellant do not seriously controvert the announced rule that part performance may be sufficient to avoid the statute of frauds, but seek to parry its force and effect by asserting that the complaint does not show part performance, in that it does not show an acceptance of the deed from father to son. It is urged that the mere averment that he accepted the deed is a conclusion of law and not the statement of a substantive fact. Without stopping to consider this assumption, we are clear that there is another averment in each paragraph which conclusively shows an acceptance. It is averred that after the execution of the deed from James T. to Curtis the latter executed to his wife a mortgage for \$7,350 upon the real estate so conveyed to him. This fact, like all other facts well pleaded, is admitted by the demurrer, and, regardless of the averment of acceptance, it clearly appears that he did in fact accept the conveyance so made.

Appellants are presumed to have known the law, and must have known that a mortgage executed by Curtis to his wife, in the absence of title in him, would have been worthless, and hence without benefit to her. By this mortgage they both treated the real estate as vested in him, and they cannot now successfully assert nonacceptance of the conveyance. To declare a contrary rule would open the door for the perpetration of unwarrantable frauds. Courts are not organized and maintained to lay down rules of law under and by which designing persons may perpetrate frauds upon their neighbors or those with whom they deal, but, on the contrary, one of the highest duties of ⁴⁴ courts, and especially courts of equity, is and should be sacredly to guard and protect against fraud, and in case of fraud to secure to the injured party his legal and equitable rights. The maxim that for every wrong there is a remedy should not be lost sight of in the administration of the law and the application of the principles of equity.

Under the averments of the complaint the appellee James T. McCoy parted with valuable property, and therefore lost a substantial right, for he has not received any consideration or thing of value in return. To this extent he has suffered a wrong, and by the terms of his complaint his only remedy is that which he here seeks to enforce, viz., a vendor's lien. If he has brought himself within the rules of pleading—for the sufficiency of his complaint is now the only question we are considering—then the court would be remiss of its duty if it did not enforce his remedy. It would be a travesty upon the law

to declare that if John Doe and Richard Roe would agree orally to exchange lands, and the latter should accept a conveyance from the former of his lands, and then refuse or for some reason be unable to convey to Doe the latter's lands, that the injured party should lose his property, and not have the right to enforce any remedy against the one that wronged him. And yet that is the very doctrine for which appellants are contending. We cannot adopt such a rule, and the authorities will not warrant it: See *Shirk v. Lingeman*, 26 Ind. App. 630, 59 N. E. 941.

The legislative branch of the state government never intended that in passing the statute of frauds it should become a shield for the perpetration of frauds, but rather an impregnable bulwark against its perpetration: *Caylor v. Roe*, 99 Ind. 1.

Other objections are urged to the complaint, but, in our judgment, they are not well taken, and need not be considered. There was no error in overruling the demurrer.

45 The next question discussed is the ruling of the court in sustaining the demurrer to the second paragraph of answer to the complaint. The material averments of this paragraph of answer are that after the execution of the contract set up in the complaint, and before the commencement of the present action, appellee James T. McCoy brought and prosecuted to an unsuccessful termination an action in the Decatur circuit court against appellee Curtis McCoy to cancel and annul the contract now sued on; that in his complaint in that action he set up the same contract he now seeks to enforce, and averred that deeds were executed from Curtis McCoy and wife to James T. McCoy for the two tracts of land Curtis was, under the contract, to convey to him; that a deed was executed by James T. to Curtis for the two hundred and thirty-nine and sixty-six one-hundredth acre tract; that said deeds were left with one Lambert in escrow, upon certain conditions specified; that said Lambert violated said conditions by delivering the deeds to Curtis McCoy, and that they were procured by the fraud of Curtis; that no title passed by said deeds; and asked that said deeds be canceled, and Curtis be compelled to convey, etc. Upon these facts the prayer of the answer was that James T. be estopped to plead the matters set up in his complaint. Appellant claims that this paragraph of answer is good upon the sole ground that appellee James T. in that action selected his remedy, and by reason thereof is estopped from pursuing a different one.

The controlling question that arises under this paragraph of answer is this: Was the election of the remedy first chosen by appellee inconsistent with the remedy he now seeks? If it was, then he would be estopped from pursuing the latter. If an action to cancel a contract, wherein the complaining party fails, is inconsistent with an action to enforce his rights under the contract, it would create an estoppel. We are unable to see any inconsistency between them. The action for cancellation in this ⁴⁶ instance was based upon fraud. By the decree of the court that issue was determined adversely to appellee, and left the contract in force as the parties made it.

A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one which is not inconsistent with his true and effectual remedy which he should have pursued in the first instance: *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Lee v. Templeton*, 73 Ind. 315; *Kelsey v. Murphy*, 26 Pa. St. 78, 83; *Morris v. Rexford*, 18 N. Y. 552. Election of remedies is the act of choosing between the different modes of procedure and relief allowed by law on the same state of facts, which modes may be termed coexisting remedies: 7 Ency. of Pl. & Pr. 361. The result of appellee's first action left him where he was in the first instance, and his present action to enforce his only remedy is not inconsistent therewith. The answer was insufficient to stand against the attack of a demurrer.

The sufficiency of the cross-complaint of appellee Arabella McCoy is brought in review by the overruling of the demurrer to it. In the cross-complaint she sets up the facts stated in the complaint, by which it is averred that under the contract between her father and brother for exchange of lands, the latter, as a part of the consideration, agreed and promised to pay her \$1,000. With the cross-complaint a copy of the deed from James T. to Curtis is filed as an exhibit. That deed contains this provision: "As a part of the consideration for the above-described real estate the grantee is to pay Belle McCoy, daughter of grantor, the sum of \$1,000." The objection urged to the cross-complaint is that it does not show any election of the cross-complainant to claim the benefit of the contract, or that she notified the parties that she had elected or would claim any benefits under it. The purpose and legal effect of that part of the contract between the contracting parties was to bestow a benefit upon a third person. ⁴⁷ There was a valid

and sufficient consideration moving from the grantee in the deed to support his promise to pay his sister \$1,000. In such case the promisee may maintain an action on the promise without notice of acceptance or demand, and the commencement of an action to enforce the promise is both an acceptance and demand: *Rodenbarger v. Bramblett*, 78 Ind. 213-216; *Copeland v. Summers*, 138 Ind. 219-223, 35 N. E. 514, 37 N. E. 971; *Risk v. Hoffman*, 69 Ind. 137-139. It was not necessary, as contended by counsel for appellants, that the cross-complaint should aver that some consideration moved from the promisee to the original contracting parties or one of them: *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Harrison v. Wright*, 100 Ind. 515, 533, 50 Am. Rep. 805; *Rodenbarger v. Bramblett*, 78 Ind. 213. We find no error in overruling the demurrer to the cross-complaint.

The remaining question for consideration is the sufficiency of the second paragraph of answer to the cross-complaint. The substance of the answer is that the cross-complainant never served notice on the parties, and that in the action between them to cancel the contract she aided and abetted her father; that she did not thereafter elect, by notice or otherwise, that she would claim any rights thereunder, and by reason of which she waived her rights. What we have said in discussing the sufficiency of the cross-complaint is applicable here, and the demurrer was properly sustained.

Judgment affirmed.

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I. Scope of Note.

In the application of the fourth section of the statute of frauds to a concrete case, two questions may arise: 1. Is the subject matter of the transaction real estate? and 2. Is the transaction itself a contract of sale? We shall be concerned, in the discussion to follow, only with the latter question, that is, what transactions amount to a contract for the sale of land within the statute of frauds. What estates and interests in land, and what incidents thereto, are within the contemplation of the statute, will not engage our attention. Moreover, we shall not consider the force and effect, under the statute of frauds, of parol contracts, further than to express the opinion that they are not void, but merely unenforceable or voidable: *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *McC Campbell v. McC Campbell*, 5 Litt. 92, 15 Am. Dec. 48; *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654; *Sims v. Hutchins*, 8 Smedes & M. 328, 47 Am. Dec. 90; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590. Nevertheless, the decisions and even the statutes themselves abound with declarations that such contracts are void.

II. Contracts Connected with or Related to Sales.

a. **An Agreement Ultimately to Convey** lands seems to be as much within the statute of frauds as an agreement immediately to convey: *Sands v. Thompson*, 43 Ind. 18; *Rucker v. Steelman*, 73 Ind. 396. Thus, an agreement to make a contract for the sale of lands must itself comply with the statute of frauds in all essential respects: *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 77 Am. St. Rep. 46, 25 South. 709; *Lawrence v. Chase*, 54 Me. 196. An agreement by which one promises to sell another an interest in land upon tender within a specified amount falls within the statute: *Lyons v. Bass*, 108 Ga. 573, 34 S. E. 721. And where a father conveys land to his sons, they verbally agreeing that after his death they will convey the property to a sister or pay her a stipulated sum in money, their promise cannot be enforced: *Patterson v. Cunningham*, 12 Me. 506.

b. **For Assignment, Surrender or Rescission.**—An agreement in writing to convey land may be the subject of a gift by delivery without any written assignment: *Huggin's Estate*, 204 Pa. St. 167, 53 Atl. 746. And the taking of a bond for title by assignment, under a contract to pay the purchase money due the vendor, is not a contract for the sale of land: *Ford v. Finney*, 35 Ga. 258. A contract whereby a vendor undertakes to substitute another person to his rights as against the vendee, is held not a contract for the sale of land in *Doggett v. Patterson*, 18 Tex. 158. In Michigan, the purchaser in a land contract cannot surrender his interest thereunder by parol: *Stewart v. McLaughlin*, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218. As to the surrender of a vendee's interest under a contract to convey by acts inconsistent with the continuance of the contract, see *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835; *Maxon v. Gates*, 112 Wis. 196, 88 N. W. 54. A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due and founded upon no new consideration, will be treated invalid in a suit by the vendor for the purchase money, unless it is followed by an actual abandonment of the sale by both parties, and a restoration of the property to the vendor so far as possible: *Pratt v. Morrow*, 45 Mo. 404, 100 Am. Dec. 381.

c. **Exchange of Lands.**—A contract for the exchange of lands, as is held in the principal case, is as much within the statute of frauds as is a contract for their sale, and is, therefore, unenforceable (*Stark v. Cannady*, 13 Ky. (3 Litt.) 399, 14 Am. Dec. 76; *Morgan v. McGowan*, 4 Mart., O. S. (La.), 209; *Maydwell v. Carroll*, 3 Har. & J. 361; *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323; *Beckmann v. Mephram*, 97 Mo. App. 161, 70 S. W. 1094; *Rice v. Peet*, 15 Johns. 503; *Lindsley v. Coats*, 1 Ohio, 243; *Moss v. Culver*, 64 Pa. St. 414, 3 Am. Rep. 601; *Lanfer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549; *Purcell v. Miner*, 71 U. S. (4 Wall.) 513, 18 L. ed. 435), unless executed by a change of possession in accordance therewith: *Rey-*

nolds v. Hewett, 27 Pa. St. 176; Brown v. Bailey, 159 Pa. St. 121, 28 Atl. 245.

d. Establishment of Title.—An agreement to make a title good is within the statute of frauds: Bryan v. Jamison, 7 Mo. 106. Thus, where one, upon giving a deed of release and quitclaim, stipulates that if the deed does not pass and secure the land to the grantee, he will make it good, this is a promise to convey a good and legal title, and is therefore invalid under the statute of frauds: Bishop v. Little, 5 Me. 362. And where, at an execution sale, A agrees with B that if B will purchase the land, A will invalidate certain deeds and put B in possession, the agreement, if in parol, is not enforceable: Duvall v. Peach, 1 Gill, 172.

e. Restrictions and Reservations.—An agreement restricting the use or enjoyment of the premises conveyed is not within the statute of frauds: Bostwick v. Leach, 3 Day, 476; Leinaw v. Smart, 11 Humph. 308. Compare Duncan v. Labouisse, 9 La. Ann. 49. Thus, an agreement not to carry on a particular kind of business on real property, made at the time of its transfer, is not a contract for the sale of lands or for some interest in them: Hall v. Solomon, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876. See, further, the note to Green v. Batson, 5 Am. St. Rep. 200.

A grantor cannot, by a parol reservation, retain title, in derogation of his grant, to buildings, structures, trees, and other portions of the real estate: Noble v. Bosworth, 19 Pick. 314; Detroit H. & I. R. Co. v. Forbes, 30 Mich. 165; Dodder v. Snyder, 110 Mich. 69, 67 N. W. 1101; Wintermute v. Light, 46 Barb. 278; Leonard v. Clough, 133 N. Y. 292, 31 N. E. 93; Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588; Bond v. Coke, 71 N. C. 97; Jones v. Timmons, 21 Ohio St. 596. There may, according to many authorities, be a parol reservation of growing crops: Heavilon v. Heavilon, 29 Ind. 509; Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Baker v. Jordan, 3 Ohio St. 438; Backenstoss v. Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Kerr v. Hill, 27 W. Va. 576. But see Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Powell v. Rich, 41 Ill. 467; Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438; Kammroth v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213; Kirkeby v. Erickson, 90 Minn. 299, 96 N. W. 705, 101 Am. St. Rep. 411, and cases cited in the cross-reference note thereto; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.

f. Revival of Writings.—A contract for the sale of land which has by its terms expired cannot be revived by parol: Davis v. Parish, 16 Ky. (Litt. Sel. Cas.) 153, 12 Am. Dec. 287. To the same effect, see Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Scott v. Sanders, 29 Ky. (6 J. J. Marsh.) 506; Maxfield v. West, 6 Utah, 327, 23 Pac. 754. Where a mortgage has been satisfied by a payment of the indebtedness, the lien becomes extinct, and cannot be revived by an oral agreement so as to make it a new security for a purpose other than

that for which it was executed: *Bailey v. Rockafellow*, 57 Ark. 216, 21 S. W. 227.

III. Contracts Collateral and Subsequent to Sale.

a. *Collateral Agreements, Generally.*—The fourth section of the statute of frauds refers to contracts for the sale of lands, and not to collateral or independent undertakings outside such contracts: *Lamm v. Port Deposit Homestead Assn.*, 49 Md. 233, 33 Am. Rep. 246; *Buzzell v. Willard*, 44 Vt. 44. "The fact that a certain stipulation is made at the same time, and forms a part of an arrangement for the sale of an interest in land, does not prevent an action from being maintained upon it, provided: 1. That the action does not tend to enforce the sale or purchase of the interest in land; and 2. That the stipulation is susceptible of being separately enforced by action. Such stipulations, collateral to the sale, but contained in the same contract, have been repeatedly enforced": *Wetherbee v. Potter*, 99 Mass. 354.

b. *As to Quantity of Land.*—An agreement by a vendor, made contemporaneously with the sale of land, that in case of a shortage in the quantity of land he will make good the deficiency, or make a discount or abatement in the price, or refund the purchase money pro tanto, is not within the statute of frauds: *Gillet v. Burr*, 1 Root, 74; *Mott v. Hurd*, 1 Root, 73; *Sherrill v. Hagan*, 92 N. C. 345; *McGee v. Craven*, 106 N. C. 351, 11 S. E. 375; *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476. There is an early Connecticut case to the contrary: *Bradley v. Blodget*, Kirby, 22, 1 Am. Dec. 11. But it is much weakened as an authority by the subsequent cases of *Baxter v. Gay*, 14 Conn. 122; *Haviland v. Sammis*, 62 Conn. 44, 36 Am. St. Rep. 330, 25 Atl. 394. According to this last case, if one who has agreed to purchase a lot represented to be one hundred feet wide, on being tendered a conveyance describing the lot as being one hundred feet wide, more or less, refuses to accept the conveyance, whereupon the vendor, by his agent, agrees verbally that if the vendee will accept the deed, the vendor will pay the difference in value between the tract described in the deed and the tract represented, such agreement may be enforced.

On the other hand, it would seem clear that an agreement between the parties to a sale of land, that if the tract proves larger when surveyed than the contract calls for the vendee shall pay an increased price, is not within the statute of frauds: *McConnell v. Brayner*, 63 Mo. 461; *Garrett v. Malone*, 8 Rich. 335; *Davis v. Tisdale*, 12 Tenn. (4 Yerg.) 173; *Seward v. Mitchell*, 41 Tenn. (1 Cold.) 87. A contrary view is taken, however, in *Northrop v. Speary*, 1 Day, 23, 2 Am. Dec. 48.

Parol evidence is not admissible, it has been held, to prove a warranty of the quantity of land conveyed by deed: *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313. But see *Schrivver v. Eckenrode*, 94 Pa. St. 456, and consult the note to *Green v. Batson*, 5 Am. St. Rep. 197-201.

c. Payment of Taxes.—An agreement by either of the parties to a conveyance of land to pay the taxes that are or may be assessed thereon is not a contract for the sale of lands, and may rest in parol: *Post v. Gilbert*, 44 Conn. 9; *Brackett v. Evans*, 55 Mass. (1 Cush.) 79; *Preble v. Baldwin*, 60 Mass. (6 Cush.) 549; *Carr v. Dooley*, 119 Mass. 294; *McCormick v. Chevers*, 124 Mass. 262. See, too, *Heald v. Ross* (N. J. Eq.), 47 Atl. 575.

d. Subsequent Agreements.—Where a deed has been executed, or a title in any way passed, agreements between the parties as to pecuniary liabilities growing out of the transaction, but not going to take any interest in the land from the grantee, are not affected by the statute of frauds: *Negley v. Jeffers*, 28 Ohio St. 90; *Johnson v. Clarkson* (Tex. Civ. App.), 29 S. W. 178. Parol evidence of an agreement, subsequent to a contract for the sale of land, as to the place of payment, is not affected by the statute of frauds: *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526.

IV. Contracts in Which a Third Person Participates.

a. In General.—Where a father sold land, the title to which was in the name of the son, and at the request of his father the son conveyed the land to the purchaser and consented that the father should receive the notes for the purchase price, it was held, in a suit by the son, after the notes were paid, against the father's administrator to recover the amount received for the land, that this was not an agreement for the sale of lands within the statute of frauds: *Woodward v. Smith*, 7 Ala. 112. And where A contracted for the purchase of real estate, paid for it, and subsequently assented by parol that the deed should be made to B in consideration of the latter assuming certain liabilities for the former, B may rebut any supposed equity of A without violating the statute of frauds: *Haslage v. Krugh*, 25 Pa. St. 100. But an oral agreement by A with B to pay for land to be deeded by him to C is invalid, although B deeds the land accordingly: *Liddle v. Needham*, 39 Mich. 147, 33 Am. Rep. 359.

b. Agreements to Buy for Another.

1. In General.—It is said that although the statute of frauds speaks only of contracts for the sale of lands, contracts whereby one agrees to purchase land for another are equally within its operation: *Hocker v. Gentry*, 60 Ky. (3 Met.) 463. See, too, *Rawdon v. Dodge*, 40 Mich. 697; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; *Allen v. Richard*, 83 Mo. 55. But see *Deiderick v. Alexander*, 58 Kan. 56, 48 Pac. 594; *Little v. McCarter*, 89 N. C. 233. A parol agreement by one person to purchase land and convey it to another whenever advances are repaid is invalid: *Myers v. Byerly*, 45 Pa. St. 368, 84 Am. Dec. 497. So, if a person gives his note for the purchase price of land which another desires to buy, and agrees with the latter that he may have the land if he can and will pay for it, the agreement is within the statute of frauds: *Chambliss v. Smith*, 30

Ala. 366. And a verbal agreement between two persons whereby one, as the agent of the other, is to buy specified land, take title in his own name, and hold it till the other is ready to pay for it, and then, retaining a portion for his services, convey the residue to the principal, is invalid: *Spencer v. Lawton*, 14 R. I. 494; *Bowen v. Sayles*, 23 R. I. 34, 49 Atl. 103. See, too, *Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333; *McDonald v. Maltz*, 78 Mich. 685, 44 N. W. 337. An agreement to procure a conveyance on the best possible terms, and to convey an undivided interest therein to another, is a contract for the sale of land: *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. Rep. 486, 29 L. ed. 703, affirming 4 Mont. 342, 1 Pac. 710.

But the statute of frauds, in requiring contracts for the sale of lands to be in writing, contemplates, as a rule, transactions between parties contracting with each other as principals; it does not extend to an agreement between a principal and his agent by which the latter is to be paid, for his services in obtaining lands, a percentage of the profits on their subsequent sale: *Carr v. Leavitt*, 54 Mich. 540, 20 N. W. 576. To the same effect, see *Heyn v. Philips*, 37 Cal. 529; *Bannon v. Bean*, 9 Iowa, 395; *Lesley v. Rosson*, 39 Miss. 368, 77 Am. Dec. 679; *Fiero v. Fiero*, 52 Barb. 288; *Benjamin v. Zell*, 100 Pa. St. 33; *Harben v. Congdon*, 41 Tenn. (1 Cold.) 221; *Walters v. McGuigan*, 72 Wis. 155, 39 N. W. 382. An oral agreement by which one is to negotiate the purchase of land, and the other is to pay the price and take title, and when the latter sells, the profits shall be divided between them, is not within the statute of frauds: *Snyder v. Wolford*, 33 Minn. 175, 53 Am. Rep. 22, 22 N. W. 254. And a contract whereby the defendant agrees to pay the plaintiff a specified sum per acre for all land which the latter examines and advises the former to purchase, and which he does purchase, is not within the statute: *Wilson v. Morton*, 85 Cal. 598, 24 Pac. 784.

2. For a Corporation to be Formed.—An agreement between persons about to form a corporation, that if one of them will purchase a site for a factory, build a factory, equip it, and turn the property over to the corporation, he shall be paid therefor in stock, is a contract to convey land and within the statute of frauds: *McLennan v. Boutell*, 117 Mich. 544, 76 N. W. 75.

3. At a Judicial Sale.—An agreement by a purchaser at a judicial sale to take the deed in his own name and convey to another will ordinarily fall within the operation of the statute of frauds: *Largey v. Leggat* (Mont.), 75 Pac. 950; *Bauman v. Holzhausen*, 26 Hun, 505; *Levy v. Brush*, 45 N. Y. 589. But see *Baker v. Wainwright*, 36 Md. 336, 11 Am. Rep. 495. However, one who verbally agrees with the owner, prior to the sale, to purchase the land and hold it for his benefit, to be redeemed on equitable terms, will oftentimes be decreed to hold the property in trust for the execution defendant, and the plea of the statute of frauds will be unavailing: *Miller v. Antle*, 2 Bush, 407, 92 Am. Dec. 495; *Denton v. McKenzie*, 1 Desaus. 289, 1 Am. Dec. 664; *Byrnes v. Morris*, 53 Tex. 213; 3 Freeman on Exe-

utions, sec. 337. But there must be special circumstances, perhaps the presence of mala fides, to warrant such a course. Where the elements of the case are simply a purchase under a parol promise to hold for the benefit of the defendant, the arrangement cannot be enforced when the statute of frauds is set up as a defense: *Rucker v. Steelman*, 73 Ind. 396; *Merritt v. Brown*, 21 N. J. Eq. 401; *Johns v. Norris*, 22 N. J. Eq. 102; *Dollar Sav. Bank v. Bennett*, 76 Pa. St. 402; *Payne v. Patterson*, 77 Pa. St. 134. See, too, *Foster v. Ross* (Tex. Civ. App.), 77 S. W. 990.

A contract by which a mortgagee agrees that, in consideration that the mortgagor will permit a foreclosure and pay the costs, he will bid in the land for the full amount, is held not within the statute of frauds: *McQuat v. Cathcart*, 84 Ind. 567. But an agreement by a creditor with the wife of his debtor that if she will join with her husband in the mortgage of his real estate, he will, upon buying at foreclosure, convey to her a portion of the property, is within the statute: *Green v. Groves*, 109 Ind. 519, 10 N. E. 401.

V. Contracts Looking Toward a Resale.

a. Agreements to Reconvey.—A promise by a vendee of lands to reconvey to the grantor is within the statute of frauds: *Holt v. Moore*, 37 Ark. 145; *Thompson v. Elliott*, 28 Ind. 55; *Peirce v. Colcord*, 113 Mass. 372; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *McEwan v. Ortman*, 34 Mich. 325; *Poppe v. Poppe*, 114 Mich. 649, 68 Am. St. Rep. 503, 72 N. W. 612; *Graves v. Graves*, 45 N. H. 323; *Lancaster v. Richardson*, 13 Tex. Civ. App. 682, 35 S. W. 749. But see *Chambers v. Butcher*, 82 Ind. 508. For example, a parol agreement by a vendee made when he receives the conveyance to reconvey to the vendor, if he does not pay the purchase price when demanded, cannot be enforced: *Gallagher v. Mars*, 50 Cal. 23. And a contract by which a grantee is to reconvey to the grantor upon payment of an indebtedness by the latter to the former is a contract for the sale of lands: *Crutcher v. Muir*, 90 Ky. 142, 29 Am. St. Rep. 366, 13 S. W. 435. See, also, *Greer v. Greer*, 18 Me. 16; *Hurley v. Donovan*, 182 Mass. 64, 64 N. E. 685. A parol agreement by a vendee that he will reconvey one-half of the land will not be enforced: *Campbell v. Campbell*, 55 N. C. (2 Jones Eq.) 364. And a contract by a grantee to reconvey and divide the increase in price if the grantor can find a purchaser within a year at a higher price, is within the statute of frauds: *Ballard v. Bond*, 32 Vt. 355. In *Burrell v. Root*, 40 N. Y. 496, it is held that an agreement by a vendor that within a certain time the land would be worth a certain amount, and that he would purchase it back at that price if the vendee desired to sell, is not a contract for the sale of lands. Where a conveyance is absolute on its face, a contemporaneous oral agreement that it shall operate as a conditional sale only, with the right on the part of the vendor to repurchase, is invalid under the statute of frauds: *Groves v. Clements*, 94 Ala. 337, 10 South. 906.

b. Agreement to Give Vendor Part of Proceeds.—An agreement by a grantee when he buys land and receives a deed therefor to pay the grantor a further sum as a part of the price, out of the proceeds of the sale when he sells it, is not within the statute of frauds: *Price v. Sturgis*, 44 Cal. 591; *Mahagan v. Mead*, 63 N. H. 130. See, too, *Gwaltney v. Wheeler*, 26 Ind. 415; *Reyman v. Mosher*, 71 Ind. 596; *Graves v. Graves*, 45 N. H. 323; *Massey v. Holland*, 25 N. C. (3 Ired.) 197; *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264. So, an agreement by the grantee that in case he sells the land for more than twice the price paid he will divide the profits with the grantor is not within the statute: *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500. Where one agrees with a mortgagor to purchase the mortgage, sell the mortgaged property, satisfy the mortgage, and pay him the balance, the agreement is not within the statute: *McGinnis v. Cook*, 57 Vt. 36, 52 Am. Rep. 115.

VI. Joint Enterprises and Adventures.

a. To Explore the Public Domain.

1. To Locate and Enter Land.—A contract by which parties agree to acquire land together, one furnishing the certificate, and the other the labor and expense of surveying and patenting it, is not a contract for the purchase and sale of land: *Watkins v. Gilkerson*, 10 Tex. 340; *Gibbons v. Bell*, 45 Tex. 417. See, too, *Smith v. Brooks*, 4 Tenn. (3 Hayw.) 248; *Davis v. Walker*, 5 Tenn. (4 Hayw.) 295; *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 688; *James v. Drake*, 39 Tex. 143. In *Ratliff v. Trout*, 29 Ky. (6 J. J. Marsh.) 605, it is held that an agreement to survey and patent certain land is a contract, not for the sale of land, but for procuring a patent. An agreement between persons having claims on public lands that one shall enter the tract on which they are located, and the other shall pay his proportion toward the entry, is not within the statute of frauds: *Bryant v. Hendricks*, 5 Iowa, 256. But no trust arises, under the Minnesota statutes, in favor of one who settles upon and improves government land, and agrees, by parol, with another that the latter shall enter it in his own name at the land office, pay for it, and convey it to the former upon repayment of the purchase price: *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97.

2. To Discover and Locate Mines.—An agreement between two or more persons to explore the public domain and discover and locate mining claims for the joint benefit of all, is not within the statute of frauds; and if, in pursuance thereof, one of them locates a claim in his own name, he will hold the legal title to the interest of the others in trust for them: *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Meylette v. Brennan*, 20 Colo. 242, 38 Pac. 75; *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195; *Hirbour v. Reeding*, 3 Mont. 15; *Eberle v. Carmichael*, 8 N. Mex. 696, 47 Pac. 717; *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492.

b. To Purchase Land.

1. In General.—Where one loans money to a purchaser of lands who takes title in his own name, under a parol promise that the lender shall have an interest in the land, to the extent of his loan, the agreement is for the purchase of an interest in land, and is not enforceable if in parol: *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512. And an agreement by two persons to become joint purchasers of certain real estate, each to furnish one-half the purchase money, is within the statute of frauds; and when, in pursuance of such agreement, a purchase is made in the name of one alone, although the other advances a part of the purchase money, a constructive trust that can be enforced is not created: *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14. See, also, *Morton v. Nelson*, 145 Ill. 586, 32 N. E. 916; *Evans v. Green*, 23 Miss. 294; *Clawater v. Tetherow*, 27 Mo. 241; *Levy v. Brush*, 45 N. Y. 589; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616.

An agreement between two persons that one of them shall bid off land at an auction or judicial sale, and that the tract shall then be divided between them, is within the statute of frauds: *Roughton v. Rawlings*, 88 Ga. 819, 16 S. E. 89; *Parsons v. Phelan*, 134 Mass. 109. Compare *Marie v. Garrison*, 13 Abb. N. C. 210.

2. To Share Profits.—While a contract by two or more persons to purchase real estate for their joint benefit is within the statute of frauds, it seems that an agreement to create a partnership for the purpose of buying and selling lands for profit is not an agreement for the sale of lands, and is not within the statute: *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Pennybacker v. Leary*, 65 Iowa, 220, 21 N. W. 575; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Fountain v. Menard*, 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601; *Davenport v. Buchanan*, 6 S. Dak. 376, 61 N. W. 47; *Case v. Seger*, 4 Wash. 492, 30 Pac. 646; *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592. See, too, *McClintock v. Thweatt*, 71 Ark. 323, 72 S. W. 1093; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; *Davis v. Gerber*, 69 Mich. 246, 37 N. W. 281; *Traphagen v. Burt*, 67 N. Y. 30; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Appeal of Everhart*, 106 Pa. St. 349; *Howell v. Kelly*, 149 Pa. St. 473, 24 Atl. 224; *McElroy v. Swope*, 47 Fed. 380. The law upon this subject, however, is not entirely settled: *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; note to *McCormick's Appeal*, 98 Am. Dec. 201.

But where two separate owners of real estate, purchased by their separate funds, enter into a copartnership with reference to a sale thereof, by a parol contract, such contract is within the statute of frauds: *Goldstein v. Nathan*, 158 Ill. 641, 2 N. E. 72.

VII. Contracts Affecting Husband and Wife.

a. Ante and Post Nuptial Contracts.—A prenuptial agreement that the surviving spouse should hold the share of the estate of the deceased spouse coming to him or her by law for life only, and that at the death of the survivor it should revert to the estate of the first decedent, is held invalid as to real estate in *Steen v. Kirkpatrick* (Miss.), 36 South. 140. But where a woman enters into a contract of marriage, relying upon an oral agreement by the man to convey land to her, such antenuptial contract is held to be unaffected by the statute of frauds: *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698. A verbal postnuptial agreement canceling an antenuptial agreement and restoring the wife to her marital rights in her husband's lands, is held invalid under the statute of frauds in *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551.

For other authorities on this question, see the monographic note to *Adoue v. Spencer*, 90 Am. St. Rep. 150, 511.

b. Dower Assignments and Transfers.—As the assignment to a widow of her dower does not create or transfer any interest in land, an instrument in writing is not indispensable thereto: *Johnson v. Neil*, 4 Ala. 166; *Pearce v. Pearce*, 184 Ill. 289, 56 N. E. 311; *Conant v. Little*, 18 Mass. (1 Pick.) 189; *Pinkham v. Gear*, 3 N. H. 163. A parol agreement by a widow and the heir as to the division between them of the rents and profits of a mine should be regarded as the assignment of dower and valid under the statute of frauds: *Lenfers v. Henke*, 73 Ill. 405. Dower can be waived, released, or discharged, however, only by an instrument in writing: *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Switzer v. Hank*, 89 Ind. 73; *Lothrop v. Foster*, 51 Me. 367; *Wright v. De Groff*, 14 Mich. 164; *Gordon v. Gordon*, 56 N. H. 170; *Keeler v. Tatnell*, 23 N. J. L. 62; *Houston v. Smith*, 88 N. C. 312. And a promise by a vendor, made pending negotiations for a sale, to procure a relinquishment of his wife's dower rights in the land, is within the statute of frauds: *Martin v. Wharton*, 38 Ala. 637.

VIII. Contracts Affecting Testator, Heir and Devisee.

a. A Contract to Make a Will devising lands is generally regarded as within the statute of frauds, and therefore unenforceable if not in writing: *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572; *Gooding v. Brown*, 35 Hun, 148; *Howard v. Brower*, 37 Ohio St. 402; *Campbell v. Taul*, 11 Tenn. (3 Yerg.) 548; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. And if the devise includes both realty and personality, the agreement cannot be enforced as to either, where it is an entire contract: *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471, 44 N. E. 124; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148; *Swash v. Sharptain*, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *In re Sheldon's Estate* (Wis.), 97 N. W. 524.

Agreements to make a devise are often made in consideration of services and support to be rendered by the promisee to the promisor. Such agreements, however, are within the operation of the statute of frauds: *Preston v. Casner*, 104 Ill. 262; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; *Aldering v. Allison*, 31 Ind. App. 397, 68 N. E. 185; *Ludwig v. Bungart*, 68 N. Y. Supp. 91, 48 App. Div. 613; *Newcomb v. Cox*, 21 Tex. Civ. App. 583, 66 S. W. 338; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252, 4 L. R. A. 55. But see *Myles v. Myles*, 69 Ky. (6 Bush) 237. But the promisee is, after substantial performance on his part, frequently entitled to relief: *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Sutton v. Hayden*, 62 Mo. 101; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Plufgar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Quinn v. Quinn*, 5 S. Dak. 328, 49 Am. St. Rep. 875, 58 N. W. 808; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992. See, however, *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222.

Where two persons mutually agree that each shall make a will of his estate in favor of the other, the agreement is in the nature of a contract for the sale of lands within the statute of frauds: *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573. If, however, when such an agreement is executed, one of the parties has both real and personal property, but at the time of her death she has only personalty, the contract is not within the statute, for it was intended to operate only upon such property as she possessed at the time of her death: *Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757, 1035.

b. Agreements Concerning Expectancies.—A release or transfer by an heir of his expectancy is unenforceable if not in writing: *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267; *Riddell v. Riddell* (Neb.), 97 N. W. 609; *Brands v. De Witt*, 44 N. J. Eq. 545, 6 Am. St. Rep. 909, 10 Atl. 181, 14 Atl. 894; *Vick v. Vick*, 126 N. C. 123, 35 S. E. 257. See, too, *Matter of Sproule*, 87 N. Y. Supp. 432, 42 Misc. Rep. 448. So is a parol agreement by a number of heirs that their coheir may have the land inherited if he will defend a suit against them, and save them from cost: *Howton v. Gilpin*, 24 Ky. Law Rep. 630, 69 S. W. 766. However, it seems that an oral agreement between a widow and her children that she will retain possession for life, instead of claiming the land in fee as given her by the will, is valid: *Choquette v. Barada*, 28 Mo. 491.

IX. Sales at Public Outcry.

a. Auction Sales, Generally.—It seems to have been long since settled that a sale of land at public auction is within the statute of frauds: *People v. White*, 6 Cal. 75; *White v. Crew*, 16 Ga. 416; *Burke v. Haley*, 7 Ill. 614; *Jackson v. Bull*, 1 Johns. Cas. 81; *Kurtz v. Cum-*
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tings, 24 Pa. St. 35; Brock v. Jones, 8 Tex. 78; Brent v. Green, 6 Leigh, 16. And it seems that the purchaser is not bound unless the auctioneer's memorandum is made at the time of the sale or immediately thereafter: Horton v. McCarty, 58 Me. 394; Jelks v. Barrett, 52 Miss. 315; Gwathney v. Cason, 74 N. C. 5, 21 Am. Rep. 484.

Where the talk between the auctioneer and a bidder amounts to an agreement by the former to knock down the property to the latter if he bids a certain sum, which proves to be the highest amount bid, the agreement is within the statute of frauds: Boyd v. Greene, 162 Mass. 566, 39 N. E. 277. And a verbal agreement among the bidders that one shall be considered as a joint purchaser cannot be enforced: Arden v. Brown, 4 Cranch C. C. 121, Fed. Cas. No. 510. But a fraudulent combination to stifle bidding may be proved by parol evidence: Miltberger v. Morrison, 39 Mo. 71.

b. Judicial Sales.

1. **In General.**—Judicial sales, it is believed, are ordinarily within the statute of frauds; and either party may, before confirmation, deny that any sale has been made unless it is supported by a sufficient memorandum: Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297; Bozza v. Rowe, 30 Ill. 198, 83 Am. Dec. 184; 2 Freeman on Executions, sec. 299; "Execution and Sheriffs' Sales"; "Executors and Administrators' Sales," post. The law upon this question, however, is not entirely clear. There are a number of decisions wherein it has been thought that judicial sales are without the operation of the statute: Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; Chandler v. Morey, 195 Ill. 596, 63 N. E. 512; Fulton v. Moore, 25 Pa. St. 468; Nichol v. Ridley, 13 Tenn. (5 Yerg.) 63, 26 Am. Dec. 254. And see, also, the following paragraphs. In some states the statute expressly provides that no note or memorandum is necessary to charge a purchaser at a judicial sale: Seymour v. National etc. Loan Assn., 116 Ga. 285, 94 Am. St. Rep. 131, 42 S. E. 518.

2. **Execution and Sheriffs' Sales** are, by the great weight of authority, within the statute of frauds, and require some written memorandum to support them: Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Chapman v. Harwood, 8 Blackf. 82, 44 Am. Dec. 736; Gossard v. Ferguson, 54 Ind. 519; Pepper v. Commonwealth, 22 Ky. (6 T. B. Mon.) 27; Barney v. Patterson, 6 Har. & J. 182; Fenwick v. Floyd, 1 Har. & G. 172; Evans v. Ashley, 8 Mo. 177; Alexander v. Merry, 9 Mo. 514; Joslin v. Ervien, 50 N. J. L. 39, 12 Atl. 136; Jackson v. Catlin, 2 Johns. 248, 3 Am. Dec. 415; Elfe v. Gadsden, 2 Rich. 373; Rugely v. Moore, 23 Tex. Civ. App. 10, 54 S. W. 379; Remington v. Linthicum, 39 U. S. (14 Pet.) 84, 10 L. ed. 364. Compare Emley v. Drum, 36 Pa. St. 123; Nichol v. Ridley, 13 Tenn. (5 Yerg.) 63, 26 Am. Dec. 254.

If the property is struck off to a purchaser who fails to pay, and a resale is made for a less amount to a second purchaser, an action will not lie against the first purchaser to recover the difference, unless

there is a memorandum in writing: *Baker v. Jameson*, 25 Ky. (2 J. J. Marsh.) 547. But see *Cowgill v. Worden*, 2 Blackf. 332. The statute of frauds has no application to the enforcement of a penalty for not completing the contract of sale agreed upon, by making a bid at an execution sale: *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

3. Executors' and Administrators' Sales.—A sale at auction by an executor or administrator by order of court or under a power in the will is, according to some authorities, within the statute of frauds: *Carroll v. Powell*, 48 Ala. 298; *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184; *Wingate v. Herschauer*, 42 Iowa, 506; *Green v. Davidson*, 63 Tenn. (4 Baxt.) 488. Other authorities take quite a different view of this question, and regard such sales within the operation of the statute: *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643; *Warehime v. Graf*, 83 Md. 98, 34 Atl. 364; *King v. Gunnison*, 4 Pa. St. 171. These latter cases consider executors and administrators' sales as judicial, and hence are authority for the proposition that the statute of frauds is applicable to judicial sales.

4. Chancery Sales—Mortgage Foreclosures.—Judicial sales by a chancery court acting through its commissioners are not within the statute of frauds, according to some of the decided cases, but are binding upon the purchaser without any written contract or memorandum of sale signed by him or his agent: *Watson v. Violet*, 63 Ky. (2 Duvall) 332; *Robertson v. Smith*, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579. The theory of these cases seems to be that the purchaser, by bidding, subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceedings in which the sale is made, and may be compelled to complete his purchase by the process or order of the court.

Foreclosure sales are held not within the statute of frauds in *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374, approved in *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512; *Robertson v. Smith*, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579. But see *Kinlock v. Savage*, *Spear Eq.* 464. In *Warfield v. Dorsey*, 39 Md. 299, 17 Am. Rep. 562, it is held that an auction sale of mortgaged lands under a power contained in the mortgage, of which sale a court of equity has, by statute, the direction and control, is not within the statute. But in *Jackson v. Scott*, 67 Ala. 99, it is decided that a sale under a power in a mortgage, resting wholly in parol, is unenforceable. To the same effect is *Seymour v. National etc. Loan Assn.*, 116 Ga. 285, 94 Am. St. Rep. 131, 42 S. E. 518, where such a sale is held not to be a judicial sale. A trustee's sale, according to *Ralphsynder v. Shaw*, 45 W. Va. 680, 31 S. E. 953, is within the statute of frauds. See, too, *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 233.

An agreement that the second mortgagee is to buy at the sale under the first mortgage, and allow the first mortgagee a reasonable time to redeem by paying the amount bid, the second mortgage debt,

and other adjusted accounts, is not within the statute of frauds: *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62, 7 S. W. 570.

c. Redemption from Judicial Sales.—The statute of frauds cannot be invoked to prevent the enforcement of an agreement made by a purchaser at an execution sale to permit the debtor to redeem: *Gillespie v. Stone*, 70 Mo. 505; *Neely v. Toman*, 21 N. C. (1 Dev. & B. Eq.) 410. But a contract by the purchaser, made after the period of redemption has expired, to relinquish his claim against the land, is a contract for the sale of an interest in or concerning land within the statute of frauds: *Little v. Jones*, 56 Ark. 139, 19 S. W. 497. An agreement extending the time in which redemption may be made is not, when acted upon, within the statute: *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Griffin v. Coffey*, 48 Ky. (9 B. Mon.) 452, 50 Am. Dec. 519.

Where the owner of land sold at a tax sale and the purchaser agree that it shall not be necessary for the former to redeem in order to save his rights, and that the latter shall receive the tax deed and then quitclaim to the owner upon payment of the amount necessary to redeem under the law, and the owner, by reason of such representations, is deterred from making redemption within the time allowed by law, the transaction is not a sale within the statute of frauds: *Judd v. Mosely*, 30 Iowa, 423. See, too, *Martin v. Martin*, 55 Ky. (16 B. Mon.) 8.

Parol evidence is admissible to show that a conveyance made by a judgment debtor, after the sale of his property under execution, was for the purpose of enabling the grantee to redeem it from such sale, and that the latter agreed to hold the premises, to make such advances as should be required to pay taxes and assessments, and upon the sale thereof to repay such advances with interest, and pay the residue of the proceeds of the sale to the judgment debtor: *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119.

A promise by a purchaser at foreclosure under a power of sale in the mortgage, made to the mortgagor before the purchaser receives a deed from the mortgagor, that the purchaser will, if the mortgagor desires, reconvey the property for the amount paid, is within the statute of frauds: *Rose v. Fall River Sav. Bank*, 165 Mass. 273, 43 N. E. 93. Where the mortgagee purchases at a sale under his mortgage, and, the mortgagor not being entitled to redeem, it is agreed between the parties to the mortgage and a third person that he shall redeem for the mortgagor, and, accordingly, the third party pays the mortgagee the amount due and takes a deed of the property, agreeing to convey the mortgagor upon payment of the amount by him expended, the agreement is within the statute: *Rucker v. Steelman*, 73 Ind. 396.

The right of redemption under a deed absolute executed as security may be surrendered by parol: *Baxter v. Pritchard*, 122 Iowa, 590, 101 Am. St. Rep. 282, 98 N. W. 372. So, an agreement by the purchaser at a probate sale, with the heirs, that if they will abandon their

intention to redeem, and permit him to make a conveyance, he will pay them the amount of the interest of one of them, is not a contract for the sale of real estate: *Kaler v. Grady*, 18 Ky. Law Rep. 678, 37 S. W. 955.

X. Contracts Adjusting Rights and Claims to Property.

a. Partition Agreements.—The authorities are conflicting as to whether a voluntary partition of lands may rest in parol: See the monographic note to *Tomlin v. Hilyard*, 92 Am. Dec. 121-123; *Freeman on Cotenancy and Partition*, secs. 397-404. The tendency of the more recent decisions, however, is to the effect that a parol partition, followed by possession in severalty taken and held in accordance therewith, is binding: *Gage v. Bissell*, 119 Ill. 298, 10 N. E. 238; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79, 8 S. W. 796; *Sutton v. Porter*, 119 Mo. 100, 41 Am. St. Rep. 645, 24 S. W. 760; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027, 39 L. R. A. 537; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Aycock v. Kimbrough*, 71 Tex. 330, 10 Am. St. Rep. 745, 12 S. W. 71; *Murrell v. Mandebaum*, 85 Tex. 22, 34 Am. St. Rep. 777, 19 S. W. 880; *Mass v. Bromberg*, 28 Tex. Civ. App. 145, 66 S. W. 468; *Whittemore v. Cope*, 11 Utah, 344, 40 Pac. 256. Compare *Duncan v. Duncan*, 93 Ky. 37, 40 Am. St. Rep. 159, 18 S. W. 1022; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438; *Fort v. Allen*, 110 N. C. 183, 14 S. E. 635.

“A partition which merely severs the relation existing between tenants in common in the undivided whole and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds. The reason of this rule rests in this: That the partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title to land; it is a mere setting apart in severalty of the same interest held in common, not in other, but in the same, lands”: *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. 1036. “Partition is not a sale. It is a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interests, so that they may enjoy and possess the same in severalty. Partition, when procured by one tenant in common in invitum by judicial sentence, has never been treated as a sale or involving any of the elements of a sale”: *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. 757.

A parol partition is good, according to some authorities, although not followed by possession: *Glasscock v. Hughes*, 55 Tex. 461; *Zanderson v. Sullivan*, 91 Tex. 499, 44 S. W. 484. But many authorities “have drawn the line between a mere parol agreement to part and an agreement followed by acts of the parties on the land itself, indicating several possession taken in execution of the agreement. The former is inoperative, but the latter is valid”: *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027, 39 L. R. A. 537.

b. Boundary Adjustments and Settlements.—When the boundary line between coterminous proprietors is in dispute, and they agree upon the true division line and take possession accordingly, the agreement binds them although not in writing. The effect of the agreement is not to pass title, but to define the line to which the deeds of the respective parties extend. It is not within the statute of frauds, for it does not operate as a conveyance of land, but merely as a contract with respect to what has already been conveyed: *Sherman v. King*, 71 Ark. 248, 72 S. W. 571; *Dierssen v. Nelson*, 138 Cal. 394, 71 Pac. 456; *Lindsay v. Springer*, 4 Harr. (Del.) 547; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805; *Farr v. Woolfolk*, 118 Ga. 277, 45 S. E. 230; *Steinhilber v. Holmes (Kan.)*, 75 Pac. 1019; *Higginson v. Schaneback*, 23 Ky. Law Rep. 2230, 66 S. W. 1040; *Jones v. Pashby*, 67 Mich. 459, 11 Am. St. Rep. 589, 34 N. W. 152; *McCaleb v. Pradat*, 25 Miss. 257; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. 159; *Diggs v. Kurtz*, 132 Mo. 250, 53 Am. St. Rep. 488, 33 S. W. 815; *Hitchcock v. Libby*, 70 N. H. 399, 47 Atl. 269; *Wood v. Lafayette*, 46 N. Y. 484; *Bobo v. Richmond*, 25 Ohio St. 115; *Hagey v. Detwiler*, 35 Pa. St. 409; *Harn v. Smith*, 79 Tex. 310, 23 Am. St. Rep. 340, 15 S. W. 240; *Lecompte v. Toudouze*, 82 Tex. 208, 27 Am. St. Rep. 870, 17 S. W. 1047.

But if the location of the true boundary is known, and the adjoining owners attempt to transfer land from one to the other, changing the location of the boundary, the statute of frauds applies, and the agreement, to be valid, must be in writing: *Nathan v. Dierssen*, 134 Cal. 282, 66 Pac. 485; *Miller v. McGlaun*, 63 Ga. 435; *Smith v. Dudley*, 11 Ky. (1 Litt.) 66, 13 Am. Dec. 222; *May v. Baskin*, 20 Miss. (12 Smedes & M.) 428; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Vosburgh v. Teator*, 32 N. Y. 561; *Weeks v. Martin*, 57 Hun, 589, 10 N. Y. Supp. 656; *Walker v. Devlin*, 2 Ohio St. 593; *Nichol v. Lytle*, 12 Tenn. (4 Yerg.) 456, 26 Am. Dec. 240; *Harris v. Crenshaw*, 3 Rand. 14; *Pasley v. English*, 5 Gratt. 141; *Jenkins v. Trager*, 136 U. S. 651, 40 Fed. 726, 10 Sup. Ct. Rep. 1074, 34 L. ed. 557; *Miller v. McGlaun*, 63 Ga. 435.

A recent parol agreement between persons fixing the boundaries between unpatented mining claims is held invalid and not binding on the government in *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893.

c. Pending Suits and Judgments.—An agreement between a claimant and one in the possession, that, if a pending cause is decided in favor of the claimant, certain land will be surrendered, is within the statute of frauds: *East Omaha Land Co. v. Hansen*, 117 Iowa, 96, 90 N. W. 705. But an agreement between the parties to an action in ejectment that judgment be entered therein for the plaintiff for the whole of the premises sued for, but that execution thereon shall be restricted to that part to which his title is conceded to extend, is not within the statute: *Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581. So, an agreement between parties to set aside a judgment so far

as it affects their rights with regard to each other, which does not attempt to pass title, is not within the statute: *Whitehead v. Seanor*, 197 Pa. St. 511, 47 Atl. 978.

d. Submission to Arbitration.—An agreement to submit to arbitration a controversy concerning the title to land is within the statute of frauds: *Stark v. Cannady*, 13 Ky. (3 Litt.) 399, 14 Am. Dec. 76; *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685. But where the title is not in question, there may be a valid parol submission as to the price of land: *Davy v. Faw*, 7 Cranch, 171, 3 L. ed. 305; or as to the boundaries: *Jackson v. Gager*, 5 Cow. 383. In Vermont, an award on an oral submission as to the division line between adjoining owners is not conclusive between them, unless followed by an acquiescence of fifteen years: *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748. The general rule is, that whatever the parties may agree to between themselves, by parol, they may submit by parol to a third person for determination: *Hewitt v. Lehigh etc. Ry. Co.*, 57 N. J. Eq. 511, 42 Atl. 325, where it is held that when the only question in a submission is the amount to be paid for land already taken by a railway company, and a conveyance of which can be compelled, the submission need not be in writing.

XI. Dedication and Appropriation of Land for Public Use.

a. Dedication by Owner.—The statute of frauds is not applicable to a dedication of land for a public use: *Alden Coal Co. v. Challis*, 200 Ill. 222, 65 N. E. 665; *Mann v. Bergmann*, 203 Ill. 406, 67 N. E. 814; *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955. An agreement by a grantor to construct certain streets on his remaining land as shown on a plan if the grantees will buy a lot and build on it, is not a contract for the sale of land: *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666. See, however, *Richter v. Irwin*, 28 Ind. 26; *Hall v. Fisher*, 126 N. C. 205, 35 S. E. 425.

b. Condemnation Under Eminent Domain.—When a municipal corporation takes land under the power of eminent domain, the transfer is not within the statute of frauds: *Tamm v. Kellogg*, 49 Mo. 118; *Emburg v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325. But see *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571. And an agreement to compensate an owner for expenses incurred through the illegal appropriation of his land by a municipal corporation in widening a street is not within the statute: *Coleman v. Chester*, 14 S. C. 286.

GOSHORN v. PEOPLE'S NATIONAL BANK OF WASHINGTON.

[32 Ind. App. 428, 69 N. E. 185.]

BANK'S Liability Where Cashier Defrauds Depositor.—If a depositor, in withdrawing funds from a bank for redeposit elsewhere, adopts the cashier's suggestion to make the redeposit with a certain trust company, and executes a check in the form of a receipt which he delivers to the cashier with instructions to deposit the amount named with such company, the bank is answerable for the amount of the check if the cashier makes no remittance, but uses the receipt to cover up his own embezzlements. (p. 251.)

M. S. Hastings, J. G. Allen, J. C. Billheimer and E. E. Hastings, for the appellant.

J. W. Ogden, Ephraim Inman, B. K. Elliott, W. F. Elliott and F. J. Littleton, for the appellee.

⁴²⁸ ROBY, J. Appellant avers in his complaint that appellee, a national bank, owes him five thousand dollars, which it refuses, on demand, to pay. The trial court made a general finding for appellee and rendered judgment thereon.

Error is assigned upon its action in overruling appellant's motion for a new trial. The grounds upon which the motion was based were that the decision is not sustained by sufficient evidence and is contrary to law.

The facts out of which the controversy arise are that appellant was a depositor and had an account with appellee, the balance therein being in his favor on June 23, ⁴²⁹ 1903, to the amount of eight thousand dollars. He was also one of its stockholders. On the day named he went to the bank for the purpose of securing a draft of five thousand dollars, and depositing that amount with the St. Louis Trust Company. He told appellee's cashier that the balance was larger than he desired to carry without receiving interest, and that he was going to deposit with the St. Louis company in order to obtain interest. The cashier suggested that he make the deposit with a Louisville trust company, named, saying, "they are friends of ours." Appellant concluded to do so, and executed a check in the form of a receipt as follows:

"Washington, Indiana, June 23, 1900.

"Received of the People's National Bank *five thousand dollars cash* on account of money due me as a depositor.

"\$———.

"*Dep. Columbia Trust and Finance Co., Lou., Ky.*

"N. J. GOSHORN."

The instrument was made by the use of a blank form. The italicized words being written by the cashier, after which appellant affixed his signature and delivered the receipt to the cashier with instructions to deposit the amount named with the trust company designated. A week or so later the cashier told the appellant that "the certificate of deposit was among some other papers that I had." No remittance or deposit was made. August 31st following, the cashier destroyed certain checks which he had theretofore made upon the bank, and which after payment he was carrying as cash, and supplied the deficiency so created by appellant's five thousand dollars. Appellant's pass-book was balanced thereafter, and a charge entered therein as follows: "Dep. Col. F. & T. R. Co., \$5,000." More than a year later he discovered the fraud, and attempted to induce the cashier to make him whole, but was unable to do so. He then brought this action. The trial court found against him, apparently upon the theory that in undertaking to transmit the funds the cashier ceased to be the agent of the bank and became the ⁴³⁰ agent of the depositor. His fault being one, therefore, for which he alone was responsible, the bank being thereby exonerated as having made payment to the depositor through his agent selected for that purpose.

It is argued that there is some evidence to support the decision, and reference is made to expressions by appellant, when he learned of the fraud practiced upon him, relative to the liability of the cashier to him therefor. The facts upon which the rights of the parties depend are established without substantial dispute, and are not affected by such statements. In the absence of other directions it was the duty of the bank to pay to appellant or his agent the amount named in money: *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 6 L. R. A. 576, 23 N. E. 253; *Vansickle v. Furgeson*, 122 Ind. 450, 23 N. E. 396; *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, 7 L. R. A. 442, 24 N. E. 173; *Farmers' Loan etc. Co. v. Canada etc. R. R. Co.*, 127 Ind. 250, 11 L. R. A. 740, 26 N. E. 784.

It appears that the bank did not pay any money to appellant, or to anyone for him. The cashier merely used the receipt to cover up his own previous embezzlement. The assets of the bank were not decreased, and the juggling of accounts did not constitute payment: *Bedford Belt R. R. Co. v. Burke*, 13 Ind. App. 35, 41 N. E. 70; *Cutler v. American etc. Bank*, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; *Fowler v. Wallace*, 131 Ind. 347, 353, 31 N. E. 53.

If the bank were directed to pay to an agent of a depositor entirely disconnected from it, such direction would not authorize it to pay in evidences of indebtedness held by it against the agent, to which the depositor was a stranger. The bank has in this case parted with nothing, except certain evidence against the person whom it insists was at the time acting as agent for the depositor. More ⁴³¹ than this, it had through its cashier full knowledge of a fraud that was about to be perpetrated upon the depositor, the consummation of which was dependent upon its active assistance. So that if the premise that the cashier, for the purpose of making the remittance, was acting as agent for the depositor, were granted, the conclusion that the bank had made payment to him would not follow.

The premise cannot, however, be conceded. An important and essential function of commercial banks is found in the transmission of funds. Such transmission is usually accomplished by the issuance of drafts. It may, and frequently does, call for transportation in specie. Whether the one or the other method is pursued, the result is the same. For a consideration the customer is enabled to utilize his means at another place. This was within the power possessed by the appellee bank: *U. S. Rev. Stats.*, 2d ed., secs. 5136, 5137 (*U. S. Comp. Stats.* 1901, pp. 3455-3460); *American Ex. Bank v. Loretta etc. Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; *Bank of British North America v. Cooper*, 137 U. S. 473, 11 Sup. Ct. Rep. 160, 34 L. ed. 759. The transaction in question called for the transmission of appellant's five thousand dollars to the Louisville trust company. The receipt was *prima facie* evidence of payment. When appellee had complied with the directions given to it, such payment would cease to be controvertible. This it never made any attempt to do. It neither issued a draft, nor delivered specie to a carrier. Had it done so, and parted with value, the

question of liability for the default of some intervening agency would be wholly different from that here presented.

If it were granted that as between appellee and its officer the latter had no authority to undertake to transmit funds to the trust company, the concession would not be sufficient to sustain the judgment: *Leach v. Hale*, 31 Iowa, 69, 7 Am. Rep. 112; *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646, 10 N. E. 360.

⁴³² Appellee selected its own cashier, and held him out to the world as deserving of confidence. Those who deal with persons occupying such responsible positions have a right to rely upon their integrity, and do so constantly. Depositors do not deal at arm's-length with the cashier. In language used by Justice Paxon of the supreme court of Pennsylvania: "It would be monstrous to allow them to take advantage of the ignorant and unwary, by reason of their position, and the confidence it inspires": *Ziegler v. First Nat. Bank*, 93 Pa. St. 393, 397; *Steckel v. First Nat. Bank*, 93 Pa. St. 376, 39 Am. Rep. 758; *City Nat. Bank v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507.

Appellee received the money of appellant as a deposit. A large part of such deposit reached it through the delivery by him to it of government bonds, their sale to parties in Chicago, their transmission to a Chicago bank, and the return by that bank of the purchase price to appellee. It was appellant's debtor and cannot be permitted to cancel the obligation through the fraud of its officer acting within the scope of his apparent duty and according to the general course of business: *Case v. Bank*, 100 U. S. 446, 25 L. ed. 695; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. ed. 47.

Judgment reversed, and cause remanded, with instructions to sustain motion for new trial and for further proceedings.

A Bank holding out its officer to the world as worthy of confidence will not be permitted to profit by the frauds he thus may be enabled to perpetrate in the apparent scope of his employment: *City Nat. Bank v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507; *Farmers' etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739, 47 N. W. 402. As to the liability of a bank for the fraudulent acts of its cashier, see *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 37 Am. St. Rep. 596, 35 N. E. 982; *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503, 44 Am. St. Rep. 182, 21 S. E. 55; *Merchants' Nat. Bank v. Carhart*, 95 Ga. 394, 51 Am. St. Rep. 95, 22 S. E. 628, 32 L. R. A. 775. And as to the liability of a bank for the fraudulent act of its president, see *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

MERCER v. COOMLER.

[32 Ind. App. 533, 69 N. E. 202.]

ESTATE BY ENTIRETIES—Liability for Husband's Debt.—Land held by husband and wife as tenants by entireties is not liable to be sold on execution to satisfy a judgment against him alone. (p. 253.)

ESTATE BY ENTIRETIES—Proceeds of—Liability for Husband's Debt.—Where a husband and wife convey property and use part of the proceeds to pay for land which they take as tenants by the entireties, a judgment owned by them and recovered against a railway company for taking a part of such land is not subject to an execution against the husband alone upon a judgment for a breach of warranty in the first conveyance. (pp. 253, 256.)

B. C. Moon, for the appellant.

J. C. Blackledge, C. C. Shirley and Conrad Wolf, for the appellees.

⁵³³ **BLACK, J.** In his proceeding supplementary to execution the appellant's verified complaint showed that in 1898 the appellee John H. Coomler—his wife, the other appellee, Susan Coomler, joining—executed to the appellant a general warranty deed of conveyance for certain land in ⁵³⁴ Howard county; that this land was encumbered, and in 1899 the appellant recovered in the court below a judgment against the appellee John H. Coomler for a breach in the covenant of warranty in the deed in the sum of two hundred and fifty dollars, which judgment remained due and wholly unpaid. The issuing of two executions and returns thereon of "No property found," and the filing by the execution defendant of a schedule of property of the value of two hundred and ninety-seven dollars and thirty-five cents, claimed as exempt, being shown, it was alleged that persons named, not parties, in 1898, conveyed certain land in Grant county to the appellees, John H. and Susan Coomler, and thereafter the other defendant in this proceeding, the Chicago, Indiana and Eastern Railroad Company, entered upon the land in Grant county, and constructed its railway across it; that in 1899, in the superior court of Madison county, John H. Coomler recovered a judgment against the railroad company for one thousand dollars by reason of the construction of the railroad on this land, and this judgment remained wholly unpaid. It was alleged that the interest of John H. Coomler in the judgment against the rail-

road company, together with other property owned by him, and claimed as exempt from execution, exceeded in value six hundred dollars, the amount allowed by law as exempt, and he unjustly refused to apply the judgment, or any part thereof, to the satisfaction of the appellant's judgment above mentioned, etc. The railroad company filed pleadings admitting the rendition of the judgment against it, and, by leave of court, paid the amount of the judgment—eleven hundred and fifty-six dollars and eighty-three cents—into court, subject to the further order of the court, and was discharged. The appellees John H. and Susan Coomler, having each answered by general denial, the court, upon trial, found in their favor.

The overruling of the appellant's motion for a new trial is assigned as error. It appeared in evidence that the judgment recovered by John H. Coomler against the railroad company had been assigned by him to one Holloway, ⁵³⁵ who at the same time assigned it to the appellees "by entireties." It also appeared that the Grant county land held by the Coomlers, as tenants by entireties, had been purchased for four thousand dollars, part of the purchase money of eleven thousand dollars paid by the appellant for the land in Howard county, conveyed to him by the appellees, the remainder of that money having been used in the payment of debts of John H. Coomler. At and before the conveyance of the Howard county land to the appellant, it was agreed by the Coomlers that the title of any land bought with the proceeds should be taken in the names of both of them.

The controlling question is whether or not the judgment against the railroad company, rendered for the taking for its railway of the land owned by the appellees as tenants by entireties, which judgment is owned by the appellees, should be treated as being held by them as tenants by entireties, and therefore not subject to execution against the husband alone. It is well established that land held by husband and wife as tenants by entireties is not liable to be sold on execution to satisfy a judgment against the husband alone: *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471, 30 N. E. 909; *Fogleman v. Shively*, 4 Ind. App. 197, 51 Am. St. Rep. 213; *Humberd v. Collings*, 20 Ind. App. 93, 50 N. E. 314.

In *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254, it was decided that a crop raised on land held by husband and wife by entireties was held by them in the same manner and subject to the same law as the land itself, and therefore was not

subject to levy and sale on execution against the husband. Concerning this decision it was said in *Fogleman v. Shively*, 4 Ind. App. 197, 51 Am. St. Rep. 471, 30 N. E. 909, that its effect is that the wife is entitled to the enjoyment of the land while it is held by her and her husband as tenants by entireties, and that the taking of the crop, without her consent, for her husband's debt, would be an invasion of that right—an interference with her rights as a tenant of the entirety; that the decision does not reach the case of a voluntary ⁵³⁰ sale and conveyance of the land by the husband and wife for money or other personal property; that by such a sale and conveyance the husband and wife cease to have an estate in the land, and it is not necessary to treat the proceeds of the sale as being held by them in the same manner, and subject to the same law, in order to secure to either of them the enjoyment of the land; that neither is entitled longer to enjoy the land as such; that, having lost their estate in the land, not involuntarily or by proceedings in invitum, but by their voluntary conveyance, the personalty received therefor must be regarded, not as land, but as personal property; and that the interest of the husband in such proceeds could be subjected to the payment of his separate indebtedness.

In the case now at bar the judgment against the railroad company, rendered nominally in favor of the husband, and assigned, through a trustee, to the husband and wife "by entireties," thereby being placed in the names of its rightful owners, represented the value of a portion of the land held by the husband and wife by entireties. The tenancy by entireties of that portion was not broken by any voluntary act of the tenants. If the proceeds of the judgment, or any part of such proceeds, without the consent of the wife, should be taken and applied to the satisfaction of the individual indebtedness of the husband, the benefit to her of the creation of the tenancy by entireties would, as to such portion, be lost without her concurrence. She, as well as he is to be regarded in such connection as a tenant of the entire land taken, and, the taking being without her consent, it would seem that she, as well as he, should be regarded as the owner of the whole proceeds; that is, that they should be considered as holding the judgment as tenants by entireties, so as to prevent the forcible application of any part of it to the debts of the husband.

The learned counsel for the appellant, in argument, protests that it is not claimed on behalf of the appellant that

537 the appropriation proceeding by which the land was taken in Grant county and in which the judgment for damages therefor was awarded, severed the unity of interest of husband and wife in the money realized from the land held by them; and it is urged by counsel that the underlying theory of the appellant's case is that he had an equitable right against the Grant county land of the Coomlers, because his money went into it—because it was purchased in part with money which was equitably his; and that his equity in the land followed the fund derived therefrom into court; that the money in court as a result of the condemnation of a right of way across the Grant county land is but the substitute for the land; and that as the land was purchased by the Coomlers with his money to the extent of two hundred and fifty dollars, he having involuntarily furnished the money to buy the land, his right to be repaid is superior to any right of Susan Coomler. When Mrs. Coomler, by joining in the execution of the deed of conveyance to the appellant, relinquished her inchoate interest in the Howard county land, it was agreed that any lands bought with the proceeds should be taken as the land in Grant county was taken, the title being conveyed to the husband and wife. It was not necessary to prove any other consideration proceeding from her. The greater part of the purchase money derived from the Howard county land was used, pursuant to agreement between the husband and wife, in paying the debts of the husband. No fraudulent intent to take the title in the name of the husband and wife for the purpose of cheating the appellant or other creditors appears and the case did not proceed upon the theory that the debtor had purchased the Grant county land with his own money, and had caused the conveyance to be made to him and his wife with intent to defraud the appellant or other creditors.

Appellant claims to have proceeded upon the theory that his money went into the Grant county land, and that he should be permitted to follow it, so as to subject the judgment 538 against the railroad to his execution. What is thus called the appellant's money is the amount of damages represented by a judgment against the husband alone in an action at law against him for his breach of his covenant of warranty against encumbrances. The appellant had no claim for any money or upon any covenant against the wife, who effectually released all her inchoate interest in all the land. It cannot properly be said that any money of the appellant went into the

Grant county land. He paid the purchase money for the Howard county land to John H. Coomler, and it then ceased to be the appellant's money. He retained no ownership in it, or right to control its use. It was, as to the appellant, the property of John H. Coomler. The appellant received for his money the title to the Howard county land, which was subject to a right of way across the land for a pipe-line for oil and gas. Because of the existence of this right of way, the appellant sought and obtained a general judgment at law upon the covenant of the husband. If the theory of counsel in argument be correct, the appellant has the right to subject to his execution not merely the judgment against the railroad company, but also, and for the same reason, the land held by the appellees as tenants by entireties, on a theory, if we rightly understand his position, that he has traced particular money owned by him into the Grant county land. We have a statute which provides that when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject, however, to the following provisions: 1. Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor, and when a fraudulent intent is not disproved, a trust shall in all cases result in favor of prior creditors, to the extent of their just demands, and also in favor of subsequent creditors, if there be sufficient evidence of fraudulent ⁵³⁹ intent. 2. The provision that no use or trust shall result in favor of the person by whom the purchase money was paid shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid, or when the alienee, in violation of some trust, shall have purchased the land with moneys not his own or where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money or some part thereof: Burns' Rev. Stats. 1901, secs. 3396-3398.

The appellant's complaint seems to proceed upon the theory that the conveyance of the Grant county land gave title to the appellees, and that the interest of the husband, the execution debtor, in the judgment against the railroad company

ought to be subjected to the execution. Such a theory would seem to recognize some valid interest in the wife; but if she had a valid interest in the land as against her husband's creditor it was an interest as tenant by the entirety, and none of the land, and therefore as conceded in the argument of the appellant, none of the judgment against the railroad company, could be subjected to the execution. The argument of the appellant based upon the theory that the Grant county land was purchased in part with the money of the appellant, and that therefore the interest of both husband and wife to such extent ought to be subject to the execution, cannot prevail, for the reason that the consideration for the Grant county land, as we have sought above to show, was not paid by the appellant, or with his money, but was paid with money owned by John H. Coomler, the title being taken in the names of him and his wife, as agreed between them when the wife joined in the conveyance of the Howard county land.

Judgment affirmed.

For Authorities bearing upon the decision in the principal case, see the monographic note to Den v. Hardenbergh, 18 Am. Dec. 387; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790; Corinth v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. 618; Cole Mfg. Co. v. Collier, 95 Tenn. 115, 49 Am. St. Rep. 921, 31 S. W. 1000, 30 L. R. A. 315; Fogleman v. Shively, 4 Ind. App. 197, 51 Am. St. Rep. 213, 30 N. E. 909; Diekey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80.

BOWEN v. GERHOLD.

[32 Ind. App. 614, 70 N. E. 546.]

MORTGAGE—Suit to Redeem from.—A complaint by a mortgagor averring that the note secured by the mortgage was in part for usurious interest, that part payment had been made, and that a tender of more than was due had been refused, and praying the court to decree a satisfaction of the note and mortgage, and to decree, if the tender should be found insufficient, the amount due, which the plaintiff offers to pay, sufficiently shows a cause of action for redemption by the mortgagor. (p. 259.)

MORTGAGE—Suit to Redeem from—Tender.—In a suit to redeem from a mortgage, it is not necessary that the complaint should show a strict legal tender, kept good by bringing the money into court; an offer in the complaint to pay the amount found due is sufficient. (p. 259.)

L. D. Boyd, for the appellant.

J. L. Sims and J. H. Gould, for the appellees.

⁶¹⁵ BLACK, J. The appellee, Adam Gerhold, brought suit against the appellant and the appellees, John A. Cartwright, and Edward Bowen. The appellant's separate demurrer to the complaint for want of sufficient facts was overruled. It was alleged, in substance, in the complaint, that the plaintiff, August 14, 1896, executed to the defendants his promissory note to pay in sixty days thereafter five hundred and thirty-eight dollars and sixty-two cents to the defendants, who then and ever since that time were partners doing a banking business under a firm name stated; that the defendants had and retained possession of the note, so that the plaintiff was unable to file a copy thereof; that, concurrently with the execution thereof, to secure the payment thereof, the plaintiff executed to the defendants his mortgage, a copy of which was exhibited, whereby it was alleged the plaintiff and his wife mortgaged and warranted to the defendants certain described real estate in Carroll county, and August 18, 1896, the defendants caused the mortgage to be duly recorded, etc. The complaint contained allegations about which no question is made, to show that a portion of the amount of the note was for usurious interest and that the plaintiff had paid the note in part. It was then alleged that at the beginning of the suit, computing interest at eight per cent per annum, and deducting the payments, there was due the defendants the sum of two hundred and twenty-six dollars and ninety cents, and no more; that October 1, 1902, ⁶¹⁶ before the commencement of this suit, the plaintiff tendered to the defendants in payment of the note and mortgage, "the sum of two hundred and seventy-five dollars, in lawful money which was even more than the amount due them, which said defendants refused to accept; and, to make and keep said tender good the plaintiff has deposited with the clerk of this court the said money, subject to the order of said defendants. Wherefore, plaintiff prays that the court decree satisfaction of said note and mortgage, that they surrender possession of said note to the plaintiff, and enter satisfaction of said mortgage upon the record thereof in the office of the recorder, or that the court direct the clerk of this court to enter such satisfaction; if the court shall find that said tender is insufficient, that the court find and decree the amount due to the defendants, which plaintiff offers to pay; and for all other proper relief."

The appellant objects to the complaint on the ground of insufficiency of the allegations relating to the tender. It ap-

pears from the record that the complaint was filed in open court October 25, 1902 (the note and mortgage being payable in sixty days after August 14, 1896), and that at the time of filing the complaint "the plaintiff also pays into court the sum of two hundred and seventy-five dollars in gold, good and lawful money of the United States." We think that, in such a condition of the record, the question suggested by counsel as to whether payment of the money to the clerk of the court—the manner of payment alleged in the complaint—amounts to a payment of the money into court, and also the question as to whether the complaint shows a paying in of money of such kind as is necessary for keeping a tender good, are immaterial questions, inasmuch as it affirmatively appears that the money paid in was not merely lawful money, but was legal tender money, and that it was paid in the presence and under the supervision of the court.

If it cannot be said that it is shown that the "lawful money" alleged to have been tendered was the same money ⁶¹⁷ paid into court, and therefore legal tender money it does not necessarily follow that the complaint did not show any cause of action. It was averred that the note secured by the mortgage included, as a part of the amount for which it was given, usurious interest, and part payment was alleged, and it was claimed that only a portion of the sum represented by the note was due; and an offer of payment, and a refusal thereof, were stated. While it was claimed that the amount paid into court, so shown by the record to be legal tender money, was all that was due, and more, the plaintiff, in the complaint, proceeding upon the theory that the court should ascertain the amount really due, proposed that if the court should find that the tender was insufficient it should find and decree the amount due the defendants, which amount the plaintiff offered to pay, and he prayed for all proper relief. We think the complaint may be regarded as sufficiently showing a cause of action for redemption by the mortgagor, the suit being "really one to free the mortgagor's land from the encumbrance, to compel the mortgagee to accept the amount actually due, if any, and to discharge the mortgage of record": *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 1219.

It was not necessary that the complaint should show a strict legal tender, kept good by bringing the money into court. An equitable tender, such as was made in the conclusion of the complaint, was sufficient: See *Kemp v. Mitchell*, 36 Ind. 249,

254; *Spath v. Hankins*, 55 Ind. 155; *Coombs v. Carr*, 55 Ind. 303; *Nesbit v. Hanway*, 87 Ind. 400; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231, 9 L. R. A. 676, 25 N. E. 558; *Dawson v. Overmyer*, 141 Ind. 438, 46 N. E. 1065.

The appellant filed an answer in several paragraphs—one of them a general denial. He also filed a cross-complaint against the plaintiff and others alleged to have some interest in the land subordinate to the mortgage; the appellant alleging that the note was made to him under the firm ⁶¹⁸ name, and seeking to enforce payment thereof, and the foreclosure of the mortgage. The plaintiff answered the cross-complaint—the facts set forth in the third paragraph, pleaded as an answer of payment, being like those averred in the complaint. The only other question pressed in the appellant's brief relates to the action of the court in overruling his demurrer to this third paragraph of answer to his cross-complaint.

The court adjudged the note and mortgage satisfied, and directed the clerk to enter satisfaction upon the record of the mortgage, and adjudged that the appellant take nothing upon his cross-complaint. It was also adjudged that the money paid into court by the plaintiff belonged to the appellant, and the clerk was directed to deliver the same to the appellant. It was further adjudged that the plaintiff pay and satisfy the costs herein, to and including the filing of his complaint, and that the appellant pay and satisfy all other costs. We have not deemed it necessary to determine whether or not the third paragraph of answer to the cross-complaint stated facts sufficient for an answer to the complaint upon the note and mortgage. The only ground of attack upon the judgment against the appellant, upon the complaint of the plaintiff Gerhold, is the alleged insufficiency of his complaint, which we regard as sufficient. There could be no foreclosure of the mortgage if the mortgagor, who took the initiative, established his right to have satisfaction thereof entered of record. No error being shown, requiring a reversal of the conclusion thus reached, it does not seem to be material whether or not the answer to the cross-complaint for the foreclosure of the mortgage was technically sufficient. To reach that conclusion it was necessary for the court to find not merely all the material facts stated in that paragraph of answer, but also such additional facts as were shown in the complaint but not shown in that answer. The court expressly found the complaint to be true.

¶ The judgment for the plaintiff on his complaint, and against the appellant on his cross-complaint, does not proceed upon the ground of payment before suit brought; nor is the judgment, or any part of it, based upon the theory of a strict tender before suit, kept good by bringing the money tendered into court, in which regard the answer is attacked here. It sufficiently appears that the judgment is not affected by any supposed error in ruling upon this demurrer. Having upheld the suit of the plaintiff upon its own merits, it necessarily followed that there could be no foreclosure of the mortgage, and that there could be no recovery upon the cross-complaint; and we would not be justified in reversing the entire judgment because of an infirmity in the answer pleaded as a bar to the cross-complaint, seeking the foreclosure of the mortgage, such infirmity consisting of inadequacy of the averments of the answer to show a tender made before suit brought and kept good thereafter.

Judgment affirmed.

A *Mortgage* lien is discharged where a tender of the full amount due is refused without adequate excuse: *Benard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692. As to the sufficiency of the tender and the necessity of keeping it good, see *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231, 25 N. E. 558, 9 L. R. A. 676; *Werner v. Tuch*, 127 N. Y. 217, 24 Am. St. Rep. 443, 27 N. E. 845; *Maxwell v. Moore*, 95 Ala. 166, 36 Am. St. Rep. 190, 10 South. 444; *Hudson etc. Co. v. Glencoe etc. Co.*, 140 Mo. 103, 62 Am. St. Rep. 723, 41 S. W. 450.

'ALDEN v. WHITE.

[32 Ind. App. 671, 66 N. E. 509, 67 N. E. 949.]

JUDGMENT—Priority Among Assignees.—Where one-fifteenth of a judgment in foreclosure proceedings is assigned to each of twelve persons, the several portions of the debt being due and payable at once, the assignments being all made at one time, and the assignor retaining three-fifteenths of the judgment, and eight of the assignees reassign to a third person, and the other four reassign to the judgment plaintiff, the twelve-fifteenths, even after their reassignment, stand on an equality and have priority over the three-fifteenths. The question is not affected by the fact that the twelve assignees incur expense in defending against an unauthorized tax sale. (pp. 270, 271.)

W. H. Shambaugh and S. R. Alden, for the appellant.

W. G. Colerick, K. C. Larwill and Guy Colerick, for the appellees.

⁶⁷² BLACK, P. J. The appellant sought unsuccessfully the modification of the judgment in a suit commenced in 1890 by James B. White to revive a certain judgment rendered in 1876. White, whose personal representative is one of the appellees, filed a complaint and a supplemental complaint, and the appellant filed a cross-complaint and a supplemental cross-complaint. The averments of all these pleadings were by the court found to be true, and the facts illustrating the contention of the parties shown by those pleadings, were substantially as follows: In 1876 James B. White instituted in the court below a suit against James R. Godfrey and Archange Godfrey, his wife, on four promissory notes executed by James R. Godfrey to said White, and to foreclose four mortgages on certain land in Allen county, executed at various times by said Godfrey and wife to White, to secure the payment of the notes. October 25, 1876, judgment was rendered in that suit in favor of White against James R. Godfrey on the notes for seven thousand two hundred and forty-two dollars and twenty-three cents, with costs, without relief from valuation and appraisement laws, and against both of the defendants therein for the foreclosure of the mortgages and the sale of the real estate or so much thereof as might be necessary to pay the judgment and costs and accruing costs, which judgment, duly rendered, is in full force and effect and remains due and wholly unpaid. February 3, 1882, White, the judgment plaintiff, sold and assigned to each one of twelve persons, not including ⁶⁷³ any parties to said action one-fifteenth part of said judgment, being in all twelve-fifteenths of the judgment, all of which assignments were duly made and entered in the order-book of said court, at the place therein where the judgment was entered. The remaining three-fifteenths part of the judgment was retained by the judgment plaintiff and was still held by him at the rendition of judgment in the case at bar. At and before the execution of the mortgages, and at the time of the rendition of the judgment in 1876, Archange Godfrey was the owner of the mortgaged real estate, and she continued to be such until her death. She died intestate in 1885, leaving surviving her as her only heirs at law, to whom said real estate descended, said James R. Godfrey, her husband and a number of children and grandchildren of said James R. and Archange Godfrey. Letters of administration never were issued in the estate of Archange Godfrey. July 21, 1894, James R. Godfrey died intestate, leaving surviving as his only heirs at law the other

persons who were heirs at law of Archange Godfrey, deceased. The estate of James R. Godfrey, deceased, is insolvent. Eight of the twelve persons, to each of whom said White had assigned one-fifteenth part of the judgment and mortgage lien, severally sold, transferred and assigned to the appellant, Carrie S. Alden, their several interests in the judgment so assigned to them by White, being in all eight-fifteenths thereof; and thereafter the other four of said twelve persons assigned their interests in the judgment—being four-fifteenths thereof—to James B. White, the judgment plaintiff. The appellant continued to be the owner of the eight-fifteenths of the judgment, and the judgment plaintiff continued to be the owner of the seven-fifteenths thereof, at the time of judgment in the case at bar.

The twelve persons to whom the judgment plaintiff so assigned twelve-fifteenths of the judgment were descendants of John B. Richardville, who in his lifetime was ⁶⁷⁴ principal chief of the Miami tribe of Indians; and they as members of that tribe, by virtue of treaties with the United States, were each entitled to the sum of six hundred and ninety-five dollars and seventy-five cents, payable in January, 1882, when they were all minors. White, the judgment plaintiff, procured the father of two of these minors, and the mother of the other ten of them, to be appointed guardians of the minors, to receive the money so due them; and he took from said guardians the money so received for the minors, amounting to six hundred and ninety-five dollars and seventy-five cents for each of them, and in consideration thereof assigned of record one-fifteenth of said judgment and decree to each of said minors. Execution on the judgment and decree was stayed by agreement of record between said White and James R. and Archange Godfrey until 1882. The assignments of the interests of eight of these twelve persons to the appellant were made after the commencement of this suit to revive the judgment, and the assignments of the interests of the other four of those persons were made to White afterward, also pending this suit. In the repurchase of the one-fifteenth interest of each of said four persons by the judgment plaintiff he paid five hundred dollars for each of such interests to their guardian. The assignees of White, for the protection of the judgment and mortgage liens which had been assigned to them, procured the avoidance of certain alleged tax liens on the land, at great expense, to which White did not contribute.

The court adjudged that the decree of foreclosure and order of sale in favor of White against James R. and Archange Godfrey, with the lien of the mortgage on which the decree was based, be revived, and that execution issue thereon for the amount of said former judgment and decree with interest thereon from the rendition thereof, for the use of White, the judgment plaintiff, and the appellant; also that the clerk issue to the sheriff a certified copy of said decree and of this decree, and that the lands in question, or so much thereof as may be necessary to pay the decree ⁶⁷⁵ and costs, and the right, title and interests of the defendants herein, of whom there were a great number, be sold thereon by the sheriff, etc.; also, that the proceeds of the sale be applied, first in payment of the costs, etc.; second, in the payment to the appellant and the plaintiff of the amount of the former judgment and decree with interest, as follows: Eight-fifteenths thereof to the appellant, and seven-fifteenths thereof to the plaintiff, and the remainder, if any, into court, to abide the order thereof; "and that should such proceeds be insufficient to pay the full amount of said former decree and interest, after the payment of costs as directed, the same to be prorated to plaintiff and Carrie S. Alden in proportion to their said interests therein."

The appellant moved to modify this judgment and order of distribution in each of the following respects: 1. To strike out the provision for prorating the proceeds between the plaintiff and the appellant, if insufficient after payment of costs, to pay the entire mortgage lien and decree revived, which provision was recited in the motion; 2. To adjudge priority of right to the surplus proceeds of sale, after payment of costs, in favor of the appellant at least as against the three-fifteenths of the mortgage lien and decree never sold and assigned by the plaintiff, and to order and direct the prorating of such surplus, in case of insufficiency thereof to pay the entire decree, to the appellant and the plaintiff in the proportion of eight to the appellant and four to the plaintiff until twelve-fifteenths of the entire decree and interest be paid, and providing for payment of the remaining three-fifteenths of the decree from the remainder of such surplus; also that the court adjudge priority of right in the appellant to the surplus proceeds of the sale herein, after payment of costs, to the extent of eight-fifteenths of the mortgage lien and decree revived, and direct the payment of her said interest before payment of the seven-fifteenths to the plaintiff. This motion was overruled, ⁶⁷⁶ and the

action of the court in overruling it has been reserved for review.

It is a long-settled doctrine in this state that a mortgage of real estate is only a lien on the land as a security for the debt, the legal title remaining in the mortgagor subject to the lien of the mortgage. A mortgage purporting to be given to secure the payment of a note secures the debt of which the note is evidence; and no change in the form of the evidence of the indebtedness or in the mode or time of payment thereof will discharge the mortgage: *Bodkin v. Merit*, 86 Ind. 560; *Simmons Hardware Co. v. Thomas*, 147 Ind. 313, 46 N. E. 645; *Bray v. First Ave. etc. Co.*, 148 Ind. 599, 47 N. E. 1073.

Where judgment is recovered on a note, the note is merged in the judgment, and the judgment, and not the original evidence of the debt, is the foundation on which to rest any additional proceeding for the collection of the debt: *Cissna v. Haines*, 18 Ind. 496. A decree of foreclosure of a mortgage merges the mortgage as a cause of action, but not the special lien of the mortgage: *Evansville Gas Light Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129. The general rule is that a foreclosure and sale of mortgaged premises invests the purchaser with the fee simple, and the mortgage becomes extinct: *Murdock v. Ford*, 17 Ind. 52. The title passes when the deed is made. The judgment of foreclosure, with or without a sale thereunder, except a sale consummated by a deed, does not discharge the lien: *Davis v. Langsdale*, 41 Ind. 399.

The assignment of a judgment carries the debt, and with it all rights and remedies for its recovery or collection: *Bolen v. Crosby*, 49 N. Y. 183.

The assignment of a debt secured by a lien carries the lien: *Forewood v. Dehoney*, 68 Ky. 174.

The assignment of a judgment on a note secured by mortgage carries with it to the assignee the mortgage lien for the amount reduced to judgment: *Applegate v. Mason*, 13 Ind. 75.

⁶⁷⁷ In *Lapping v. Duffy*, 47 Ind. 51, it was held that when a judgment is rendered upon notes, and for the foreclosure of a mortgage given to secure their payment, the lien of the mortgage continues, and that a part of such a judgment may be assigned and the parties owning the several parts thereof may unite in an action to enforce the payment: See, also, *Teal v. Hinchman*, 69 Ind. 379; *Pattison v. Hull*, 9 Cow. 747.

On the subject of the order of priority, where all of a number of notes secured by mortgage have been assigned separately to different persons by the mortgagee, who has not retained any of the notes himself, it is said in Pomeroy's Equity Jurisprudence, second edition, section 1201: "Where all the notes stand on the same footing—that is, they are all payable at the same time—the equities of all the assignees are equal, and there is no preference or priority among them in enforcing the security of the mortgage. All the assignees are entitled to a pro rata share of the proceeds of the mortgaged premises, in case there is not sufficient to pay all the notes in full. . . . Where the notes, payable at different dates, are assigned by the mortgagee to different persons, either at the same or different times, and either with or without an accompanying assignment of the mortgage, the following may be regarded as the prevailing general rule determining the right of the respective assignee: Since the assignment of each note is a pro tanto assignment of the mortgage, the holders of the successive notes are regarded as being exactly in the situation of holders of successive mortgages upon the same land; their equities among themselves, and their rights to enforce the security of the mortgage, are not equal; they are entitled to priority in the mortgage security of their respective notes according to the order of time in which such notes become due and payable. The order of maturing among the notes fixes the order of preference and priority among the respective assignees." The rule so stated, which is commended in a note to the ⁶⁷⁸ section from which we have quoted, has obtained in this state. After stating various other rules prevailing in some of the states as to the rights of assignees among themselves, the learned author says (section 1203) that "a different principle may operate between an assignee and the mortgagee. When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature." In a note to this statement in the text of the section last mentioned, it is said: "The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a pri-

ority or even an equality of right in sharing the insufficient proceeds."

In Jones on Mortgages, fifth edition, section 1701, it is said: "The equity arising from priority of assignment where this equity is held to give a preference, is generally regarded as paramount to the equity arising from the maturity of the notes as against the assignor; but as between different assignees, the equity arising from priority of maturity is paramount. Generally it may be said the effect of an assignment of one of the mortgage notes is to carry a pro rata interest in the security, subject to the paramount claim of notes previously due; and to give no right based upon the priority of assignment, except as against the assignor. . . . Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both. Unless the intention be plainly declared on the face of the assignment that the assignee is to share pro rata in the security ⁶⁷⁹ with the assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned."

In *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486, the question being an open one in this state, the court sought to place its solution upon the nature of the mortgage contract, the meaning of which was regarded as depending much upon the law of the remedy or remedies upon the notes and mortgage; and the case being one for the foreclosure of a mortgage given to secure the payment of a number of notes, all of which had been assigned, some at one time to one person, and the others at a later time to another person, and were so held, it was decided that the effect of the assignment of one of the notes so secured was to carry a pro tanto interest in the mortgage security, subject to the paramount claim of notes previously due; the different installments of the mortgage being regarded as so many successive mortgages, each having priority according to its time of becoming payable. In that case the notes assigned latest, being those which came due earliest, were given priority over the others: See also, *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *Harris v. Harlan*, 14 Ind. 439; *Murdock v. Ford*, 17 Ind. 52; *Minor v. Hill*, 58 Ind.

176, 26 Am. Rep. 71; People's Sav. Bank v. Finney, 63 Ind. 460; Doss v. Ditmars, 70 Ind. 451; Shaw v. Newsom, 78 Ind. 335; Carithers v. Stuart, 87 Ind. 424.

In *Wilbur v. Buchanan*, 85 Ind. 42, it was held that where a mortgage is given to secure payment of a number of notes maturing at different dates, executed by the mortgagor to the mortgagee, and the notes last maturing have been assigned, while the notes first maturing have been retained by the mortgagee, the assignee is entitled to priority in the mortgage security. In that case the notes last maturing were not indorsed by the mortgagee, but were bequeathed as a legacy by his last will and testament, and ⁶⁸⁰ were delivered accordingly by the administrator of his estate, while the notes first maturing became a part of the deceased mortgagee's estate.

In *Parkhurst v. Watertown etc. Co.*, 107 Ind. 594, 8 N. E. 635, the payee of three notes maturing at different times, and secured by chattel mortgage, retaining the note first maturing, assigned the other two by indorsements to different assignees. The court approved the doctrine that an indorsee of some of a number of notes so secured is entitled, in equity, to payment out of the mortgaged funds in preference to the notes retained by the mortgagee and assignor, although the notes so assigned fall due after those retained by the mortgagee. It was said: "The equitable rule rests upon the theory that as between the assignor and the assignee, by the assignment of the notes the assignor assigns the mortgage not pro rata, but pro tanto; that is, he does not assign a proportionate share of the mortgage security, but assigns so much of the security as shall be adequate for the payment of the note or notes which he assigns"; also, that the payment of the assignor's "first mortgage is postponed to the payment of the subsequent mortgages of the assignees. Equity says to the mortgagee and assignor, in such a case, that, having assigned the notes subsequently becoming due, he shall not enforce his prior lien as against his assignees holding the subsequent liens." But it was held that in such case the relation of the liens held by the assignees to each other—the priority as between them—was not changed; it being assumed, the contrary not appearing, that in the case in hand the assignments were made at the same time; that these subsequent liens so assigned would be adjusted as though there had been no prior lien in favor of the mortgagee, thereby giving the notes held by the assignees preference the one to the other according to the dates of their maturity: See *Horn v. Bennett*, 135 Ind.

158, 34 N. E. 321, 24 L. R. A. 800; *Baughner v. Woollen*, 147 Ind. 308, 311, 45 N. E. 94. See, also, *Richardson v. McKim*, 20 Kan. 346; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410.

When judgment had been obtained by the mortgagee on one of a number of notes secured by the mortgage, and he had assigned this judgment, it was held that the assignee was entitled to priority according to the date of the note on which the judgment was rendered; the judgment, for the purpose of determining the question of priority, taking the place of the note upon which it was rendered: *Funk v. McReynolds*, 33 Ill. 482.

If one holding a vendor's lien on land assign some of the purchase money notes, he will not be heard to assert the priority of his claim for the payment of the notes retained by him as against his assignee. "In that respect the rights of the parties having notice would be in no material respect different from what they would have been had the debt been evidenced by separate notes and secured by a mortgage on the land": *Yetter v. Fitts*, 113 Ind. 34, 14 N. E. 707.

If the assignor cannot assert either priority or equality for his retained portion of the debt as against his assignees to whom he has transferred other portions maturing later than the portion so retained, he ought not to be considered as having any such privilege, as against his assignees, where all portions of the debt—those retained and those assigned—have the same time of maturity, and all the assigned portions were assigned by the mortgagee at one time.

The principles expounded and applied in the authorities to which we have freely referred lead to a conclusion not in agreement with the decision before us for review. When the judgment plaintiff assigned twelve-fifteenths of the judgment—one-fifteenth thereof to each of the twelve assignees—retaining himself three-fifteenths thereof, he transferred to each of the assignees the lien upon the mortgaged land pro tanto, and not pro rata, as between the assignor and each of the assignees. The transfers being made ^{ess} at the same time, and the several portions of the judgment debt transferred not being payable at different times, but all being due and payable at once, there could be no preference or priority between the assignees themselves, but, as between them and the assignor, each was entitled to have his one-fifteenth part of the judgment paid out of the proceeds of the land before the application of any portion of such proceeds to the payment of the portion of the judgment

retained by the assignor. The assignees were entitled each, as against the assignor, not to one-fifteenth portion of the security, but to so much of the security as would suffice to pay off his one-fifteenth portion of the judgment. It cannot be questioned that the assignment of the entire judgment would have carried the entire lien. So we think the assignment of a portion of the judgment carried the lien without priority as between the assignees, but it would be as inequitable to deprive the assignees of priority against the assignor as it would be to deprive the assignee of one of the notes secured by the mortgage of priority in the mortgage security as against his assignor.

When eight of these twelve assignees so standing on an equality as to each other assigned their several shares of the debt to the appellant, she received the same remedy for the enforcement of the debt that was held by her assignors before the assignment. The lien which each of them held passed to her, and she was placed on an equality with the other four of the twelve assignees. She then had a right to assert her interest in the debt against the land, with priority as against the judgment plaintiff, but pro rata as between her and the four assignees who still retained their interests acquired by the assignment. When these four assignees reassigned to the judgment plaintiff, each of them transferred all his interest in the debt and lien. The appellant suffered no loss or detriment, and was not placed in any different relation to the portion of the debt not held by her by reason of this reassignment. She had no equitable ⁶⁶³ ground, that we perceive, for claiming to be put in any better situation by this reassignment in which she had no part, and which was quite independent of her. She cannot urge any potent reason why the judgment plaintiff should not be in the same situation by reason of the retransfer to him of the four shares in the judgment that would have been rightfully occupied by any other person to whom these four shares might have been transferred by assignment. To decide otherwise would be to depreciate the value of these four shares without reason. So, it would seem as to twelve-fifteenths of the judgment debt there is a priority of lien over the other three-fifteenths, and that the appellant and the judgment plaintiff have equal equitable rights, except as to the three-fifteenths of the judgment never assigned, as to which the judgment plaintiff should be postponed to such portion of the proceeds of the foreclosure sale as may remain after payment of the twelve-fifteenths held by him and the appellant; and if the

proceeds be not sufficient to pay the entire twelve-fifteenths of the judgment, then the appellant and the judgment plaintiff should share therein in the ratio of eight to four; the judgment plaintiff taking nothing as to three-fifteenths of the judgment held by him.

The fact that each of the twelve assignees paid full value for the several shares of the judgment assigned by the judgment plaintiff is not an immaterial matter in the consideration of the equitable relation of the assignor and the assignees; but we cannot see that the fact that upon the reassignment the four assignees accepted from the judgment plaintiff a less sum than the value of the shares reassigned is a matter which concerns the appellant, or affects her relation to the judgment plaintiff, or gives her any new priority or any preference with reference to the four shares reassigned. Nor can we see how the voluntary incurring of expense by the twelve assignees in defending for their own protection against an unauthorized tax sale gave them, ^{as} or either of them, a larger interest in the judgment or affected the right of priority which they already had against their assignor, or how the appellant can claim any greater benefit by reason of such expenditure, in addition to that of sharing equally in the right of priority with the four assignees who did not assign to her. In incurring such expense the twelve assignees did not pay off any charge on the land which the judgment plaintiff was bound to discharge for or with such assignees. If he was incidentally benefited by such expenditure, and could be under any obligation therefor, it would be a personal obligation, either conventional or merely moral, to the persons who incurred the expense, who thereafter transferred simply their interests in the judgment and the security—some of them to the appellant, and others to the judgment plaintiff. The appellant acquired by the assignments to her merely eight-fifteenths of the judgment, with the security therefor held by her assignors, while the judgment plaintiff acquired by reassignment four-fifteenths of the judgment, with like security, and continued to hold his three-fifteenths, with the subordinate lien therefor on the land.

Judgment reversed, with instruction to modify the judgment in accordance with this opinion.

ON PETITION FOR REHEARING.

BLACK, J. The learned counsel for the appellees call attention again to a portion of their argument on the original

hearing, and insist that James B. White did not assign to anyone a definite sum of the amount of the judgment, and gave no guaranty or warranty that his assignees, or any of them, would or could collect in full the parts of the judgment assigned by him to them, and did not assign to them, or any of them, the notes or the mortgages given to secure their payment, or any part or interest in the same, ^{and} all of which had been merged in the judgment; that an assignment of a judgment simply transfers the judgment to the assignee, and no liability as to the solvency of the judgment debtor attaches against the assignor, in the absence of fraud or express stipulation—referring again to authorities cited in the original brief for the appellees, some of which were cited in our original opinion. It is conceded by counsel that the principle of law stated by us is abstractly correct, but they insist that, for such reasons, it is not applicable to this case.

Our opinion does not proceed upon the ground that the notes or the mortgages are not merged as causes of action in the judgment and decree of foreclosure, or that the statutory personal liability of an assignor of promissory notes to his assignee exists in favor of the appellant against James B. White. Our statute (Burns' Rev. Stats. 1901, sec. 617) provides that all final judgments of the supreme and circuit courts for the recovery of money or costs shall be a lien upon the real estate and chattels real, liable to execution in the county where the judgment is rendered, for the space of ten years, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by an appeal or injunction, or by the death of the defendant, or by the agreement of the parties of record. It is provided by section 687 of Burns' Revised Statutes of 1901 that after the lapse of ten years from the entry of judgment or issuing of an execution, an execution can be issued only on leave of court upon motion. There was no judgment at law against Archange Godfrey, but there was a decree of foreclosure of the mortgage on her real estate, and no property of hers except the mortgaged real estate could be subjected to payment of the judgment. There was a judgment at law against James R. Godfrey, the lien of which on his real estate, if he had real estate, was not extinguished, and execution could have been obtained for the satisfaction of the judgment over at law. In this proceeding it was not sought to enforce the ^{same} judgment over against the estate of James R. Godfrey, which was insolvent.

Moore's Appeal, 92 Pa. St. 309, cited in a text-book to which counsel for the appellee refer, related to successive assignments of fractional parts of a judgment law, the assignor not retaining any part of the judgment. The decision was based on *Donley v. Hays*, 17 Serg. & R. 400, relating to successive assignments of parts of a mortgage debt, wherein a rule was announced not in agreement with the doctrine which obtains in this state. It is said in the opinion in *Moore's Appeal*, 92 Pa. St. 309: "We see no reason for applying a different rule in case of the assignment of different parts of the same judgment. Every equitable principle in regard to the application of the fund applies with equal force, whether the lien divested be a judgment or a mortgage."

In the case at bar the court dealt with the subject of priorities as to the specific lien of the mortgage upon the mortgaged real estate alone. We were not called on to decide upon any question as to the distribution of the proceeds of real estate sold or to be sold under execution on a judgment at law, as between the judgment plaintiff and assignees of parts of the judgment. The specific liens of the mortgages were not merged in the judgment of foreclosure. The continuing mortgage liens constituted a security for the judgment debt, and the assignment of parts of the judgment carried to the assignees this security. It is not contended that they have not priority over subsequent encumbrancers, but it is insisted that they should enjoy the benefit of their liens pro rata with the assignor, the judgment plaintiff. We think the doctrine of equity stated in our original opinion is applicable; that it would be inequitable to permit the assignor, where the property subject to the lien is not sufficient to pay the entire judgment, to be placed upon an equality with his assignees; but that he should be regarded as having transferred the specific ~~est~~ lien of the mortgage to the extent needed to satisfy the assigned portion of the debt secured thereby, in preference to the portion retained and never assigned by him.

Petition overruled.

The Effect of the Assignment of judgments is the subject of a monographic note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 47-57. As to the priority between assignees of different notes secured by a mortgage, see *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *First Nat. Bank v. Andrews*, 7 Wash. 261, 38 Am. St. Rep. 885, 34 Pac. 913; *Gordon v. Hazzard*, 32 S. C. 351, 17 Am. St. Rep. 857, 11 S. E. 100; *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15; *Schultz v. Plankinton Bank*, 141 Ill. 116, 39 Am. St. Rep. 290, 30 N. F. 346.

Am. St. Rep., Vol. 102-18

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

PETRIE v. CARTWRIGHT.

[114 Ky. 103, 70 S. W. 297.]

HOMICIDE by Peace Officer to Prevent Escape.—A peace officer acting without a warrant is not justified in killing a person while fleeing from arrest for a crime which is only a misdemeanor, although such officer acts upon his suspicion that a felony has been committed. (pp. 277, 278.)

EVIDENCE—Res Gestae.—In an action against a peace officer for killing a person fleeing from arrest after having had a difficulty with men who had insulted his wife and sister, evidence as to the insult and of the complaint thereof made by the wife to her husband, is admissible as part of the *res gestae*, when the whole occurrence is so closely connected that it must be regarded as one and the same transaction. (p. 278.)

Petrie & Standard, for the appellant.

C. A. Denny, for the appellee.

¹⁰⁶ HOBSON, J. The appellant, Mary Petrie, was going to her home in Elkton, Kentucky, after night, in company with her husband's sister, Mary Belle. They were followed by two men, named Blye and Crouch, the latter proposing sexual intercourse, and making an exposure of his person. They hurried on, and met Joe Petrie, the husband of Mary. She told him of the conduct of the men, and he immediately went back up the street in the direction of them. When he overtook them, he asked Crouch what he had insulted his wife for. Crouch said, "Damn your wife, and you, too." Petrie then struck him. A scuffle followed, and Crouch fell. Crouch

and Blye were white men. Petrie was a negro. The difficulty came up just in front of a billiard saloon. Blye was cutting at Petrie with his knife. Some one called out to Petrie to run, which he did. Appellee Cartwright, who was the city marshal, was in sight a few yards off, and, seeing Crouch fall as Petrie ran past called to him to halt, and, when he did not stop, fired his pistol in the ground. He then fired a second time, taking aim at Petrie, and killing him. Petrie's clothes were cut behind. His clothing was cut through and through, and his skin scraped. These cuts were made by Blye while he was scuffling with Crouch. Although the officer called to Petrie twice to stop, he does not appear to have heard him. Neither recognized the ¹⁰⁰ other in the dark. Crouch was very drunk, so that he had no recollection of what occurred. He was bruised on the back of the head by the blow or fall, but, except a knot there, received no other injury. The wife, Mary Petrie, then filed this action under section 4 of the Kentucky Statutes to recover for the death of her husband. The defendant pleaded in substance that he was acting in his official capacity; that the deceased committed an offense in his presence by striking Crouch, and immediately turned to flee; that he tried to stop him, and place him under arrest, and pursued him for that purpose, but could not overtake him, and was forced to shoot him to prevent his escaping; that he used no more force than was necessary, and that he believed, and had reasonable grounds to believe, that a felony had been committed; and that he had no other means of preventing the escape of the felon but to shoot him. The court instructed the jury that, if the officer believed in good faith, and had reasonable grounds to believe, that Petrie had committed a felony, and, after using all other available means to arrest him, fired the fatal shot solely in order to procure his arrest, and in doing so used no more force than appeared to him to be reasonably necessary in order to make the arrest, they should find for the defendant. The jury found a verdict for the defendant under these instructions, and the plaintiff appeals.

We think it evident from the proof that Petrie's flight was not to avoid arrest, but only to escape what he conceived to be an impending danger. We think it also clear that the fall of Blye was due rather to his being very drunk than to any other cause, for he seems to have fallen in the scuffle and not when he was struck. The jury were warranted in concluding from all the evidence that Petrie had in fact committed no felony.

The question, therefore, presented ¹⁰⁷ is, May a peace officer, to make an arrest upon a suspicion of felony, shoot a person who does not stop when called upon to halt? The statute provides: "A peace officer may make an arrest . . . without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony. . . . A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony. . . . No unnecessary force or violence shall be used in making the arrest": Cr. Code Prac., secs. 36, 37, 43. In *Dilger v. Commonwealth*, 88 Ky. 560, 11 Ky. Law Rep. 67, 11 S. W. 651, the court, after referring to these statutory provisions speaking of the officer's authority, said: "Our statute is silent, save as above cited, as to the force he may use. We must, therefore, turn to the common law for guidance. By it, in a case of felony, he may use such force as is necessary to capture the felon, even to killing him when in flight. Where it is a misdemeanor, however, the rule is otherwise. It is his duty to make the arrest, but, unless the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm, the latter cannot kill him. He can only do so, or inflict great bodily harm, when, by reason of the resistance, he is placed in the like danger. If he meet with resistance, he may oppose sufficient force to overcome it, even to the taking of life." In the previous case of *Head v. Martin*, 85 Ky. 481, 9 Ky. Law Rep. 45, 3 S. W. 622, the court announced the same rule. There it is also said: "Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity. They represent its majesty, and must be properly protected. But to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the ¹⁰⁸ officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse, and take the offender." The authorities are clear that where the offense is only a misdemeanor the officer cannot, to prevent his escape, take the life of the offender when in flight: *Head v. Martin*, 85 Ky. 481, 9 Ky. Law Rep. 44, 3 S. W. 622; 21 Am. & Eng. Ency. of Law, 204; *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, 18 S. W. 854, 15 L. R. A. 558; note to *Hawkins v. Commonwealth*, 61 Am. Dec. 162. They are also uniform that an officer may lawfully arrest one who, as he believes, and has reasonable grounds

to believe, has committed a felony: *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669. And it is laid down that in such case he must proceed very cautiously where the person sought to be arrested flees, as flight is different from resistance: *Note to Hawkins v. Commonwealth*, 61 Am. Dec. 162. But these authorities do not determine the question whether an officer acting without warrant is excusable for killing such a person in flight when he had reasonable grounds to believe a felony had been committed, although in fact the offense was only a misdemeanor. The common-law rule as to the arrest of a felon is thus stated in 2 Bishop's Criminal Law, section 647: "And in cases of felony the killing is justifiable because an actual arrest is made, if in no other way the escaping felon can be taken": See, also, 4 Blackstone's Commentaries, 292. In *Conraddy v. People*, 5 Park. 234, an officer, who had arrested a person on suspicion of felony, shot and killed him when he attempted to escape. The deceased was in fact guilty of only a misdemeanor, and the officer was held guilty of manslaughter. To the same effect, substantially, is the case of *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799. There an officer saw two men running, the hinder man crying out, "Stop, thief!" He commanded the ¹⁰⁰ front man to stop. The order was disobeyed. He then shot and killed him. It was held that, as he had reasonable cause to believe a felony had been committed, and shot merely to intimidate the man sought to be arrested, and not with the purpose of hitting him, it was a question for the jury whether he was guilty of criminal negligence.

We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common-law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited, for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felonies. To do so would be to bring many cases of misdemeanor within the rule, for in a large per cent of these cases the officer could show that he had reasons to suspect the commission of a felony, and it would be left entirely

with him to say whether he was proceeding against the defendant for a misdemeanor or for a felony. The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor, and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon ¹¹⁰ a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony. "In all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose are resisted in so doing, they may repel force with force and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable": 1 Russell on Crimes, 665. In *Lindle v. Commonwealth*, 111 Ky. 866, 23 Ky. Law Rep. 1307, 64 S. W. 986, this rule was followed where an officer attempted to arrest a person upon reasonable grounds to believe he had committed a felony, and was forcibly resisted by him. But where a supposed offender simply fails to stop when ordered to do so, a different principle applies. Although the rule is otherwise laid down in *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669, 61 S. W. 590, the question was not before the court in that case; and, as was well said in *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 70, 18 S. W. 854, 15 L. R. A. 558, the rule as thus stated is not sustained by the common-law authorities.

The court should have allowed the evidence as to what took place between Blye and Crouch and the two women, also as to what took place between them and Joe Petrie, as they were only a short distance from home when the transaction occurred, and before they got home they heard the shots. The whole thing was so closely connected that it should all be regarded as one transaction, and the evidence referred to was competent as *res gestae*.

Judgment reversed, and cause remanded for a new trial.

The Shooting of a Misdemeanant by an officer in order to arrest him or to prevent his escape, is wrongful and unauthorized: *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512, 23 South. 388, 42 L. R. A.

423; *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, 11 South. 322; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Thomas v. Kinhead*, 55 Ark. 502, 29 Am. St. Rep. 68, 18 S. W. 854. See, further, the monographic note to *State v. Evans*, 84 Am. St. Rep. 679-703; *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416, 63 S. W. 759.

CITY OF HENDERSON v. O'HALORAN.

[114 Ky. 186, 70 S. W. 662.]

MUNICIPAL CORPORATIONS—Pesthouse as Proximate Cause of Spread of Smallpox.—If the location of a pesthouse is such as to render the city liable for smallpox communicated by the pesthouse to the members of a family living near by, it is also liable to a guest of such family who contracted the disease therefrom while visiting there without knowledge of the infection at the pesthouse or in the family. The location of the pesthouse is the proximate cause of the injury to such guest. (pp. 282, 283.)

MUNICIPAL CORPORATIONS—Negligent Spread of Smallpox—Contributory Negligence.—If the location of a pesthouse is such as to make a city liable for smallpox contracted by a guest without his fault, while visiting with a family residing in the vicinity of such pesthouse, the fact that the guest while on such visit slept with a child infected with such disease, but unknown to him or the family, does not render him guilty of contributory negligence so as to bar his right to recover of such city. (p. 283.)

J. F. Lockett and Clay & Clay, for the appellant.

M. Merritt, for the appellee.

188 HOBSON, J. The city of Henderson established a pesthouse within one mile of the city boundary, by reason of which the disease of smallpox was communicated to the family of Mrs. Clayton, who lived near by. It was held that the city was liable to her in damages: *City of Henderson v. Clayton*, 22 Ky. Law Rep. 283, 57 S. W. 1. The appellee, Nannie O'Haloran, was a guest at Mrs. Clayton's house, and contracted the disease while there. This is a suit by her for damages against the city. The agreed facts are: About two weeks after the first case of smallpox had been sent to the pesthouse—a fact unknown to appellee—she came to Henderson from her home in the country, and at Mrs. Clayton's invitation went to her house, and spent the night. Upon reaching the house, she found Mrs. Clayton's little boy broken out with some eruption and asked his mother what was the matter with him. His mother answered that she supposed it was chicken-pox. Ap-

appellee did not know, and no one else then knew, the child had smallpox. She slept in the same bed with him that night and returned home the next day. The same day a physician was summoned, and pronounced the breaking out on the child smallpox. In due course of time appellee was stricken with the disease at her home, and was confined to her room about three weeks. Her person was considerably pitted with pockmarks, and she was at expense for nursing and physicians. The pesthouse was located three hundred yards from the boundary line of the city, and two hundred and fifty yards from Mrs. Clayton's house, where appellee contracted ¹⁸⁹ the disease. It is agreed as a fact that the pesthouse was maintained by the city authorities, that Perry Clayton contracted the disease from the pesthouse, and that appellee contracted it from him. On these facts the case was submitted to the court without a jury, and he entered a judgment in favor of the appellee for five hundred dollars.

It is earnestly maintained that the damages sued for are not the proximate or natural result of the defendant's wrong, and that the plaintiff was herself guilty of contributory negligence. In discussing the rule that the proximate cause is not always the nearest agency in time or space within the rule that the law regards the proximate, and not the remote, cause, in 1 Thompson on Negligence, section 48, it is said that: "The law does not consider the cause or causes beyond seeking the efficient, predominant cause, which, following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. But at the same time no act is deemed in law to contribute to an injury unless it is near to that injury in the order of causation. This is what is meant by the expression 'proximate cause.' But the nearest—in point of time or space—may not be the responsible agency at all. Thus, A negligently drives on a public street, and thereby comes into collision with the carriage of B. This causes the horses of B to take fright, and run away, injuring C. Here both reason and justice require that A should pay damages to C, and it would be against reason and justice to visit the consequences of the catastrophe upon B, who is the innocent intermediary in the causes. S., a wholesale druggist carelessly put belladonna, a deadly poison, in a package, and labeled it 'extract of dandelion,' a harmless medicine, and sent it, so labeled, into the market. After passing through the hands of several innocent persons, it ¹⁹⁰

was purchased by an apothecary, and administered to the plaintiff's wife, on the faith of the false label, injuring her. Here the negligence of the original vendor was deemed the proximate cause of the injury, and the plaintiff had an action against him. It would have been manifestly unjust to visit the consequences of the mistake upon the last apothecary selling the substance, since he had acted innocently, and without negligence. His act, though nearest in point of time, was not nearest in the line of causation. So, where a fire is negligently set out, and travels without interruption to the property of plaintiff, destroying it, the original negligence of setting it out is deemed in law the proximate cause of the plaintiff's damage, although the immediate cause may have been back fires ineffectually set to arrest the main fire, the same being swallowed up in its advance. So, where a father, mother and son were crossing a bridge, in the railing of which an opening had been negligently left, through which the son fell into the water beneath, and the father plunged in after him to save him, and both were drowned, it was held that the mother might recover damages from the state for the death of the father; for, though the peril of the child was the nearest procuring cause of the action of the father in point of time, yet the negligence of the state in leaving the bridge in a dangerous condition was the *causa causans*—the proximate cause which the law would regard. Much the same rule was applied where the plaintiff's intestate lost his own life in endeavoring to save the life of a child on a railroad track. So, where the defendant had ascended in a balloon, which descended a short distance from the place of ascent, in the plaintiff's garden, and the defendant, being entangled and in a perilous situation, called for help, whereupon a crowd of people broke through plaintiff's fence into his garden,¹⁰¹ and trod down his vegetables and flowers, it was held that, although ascending in the balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily draw the crowd into the garden, either from a desire to assist him or to gratify curiosity which he had excited, he was answerable in trespass for all the damages done to the garden of the plaintiff. Nevertheless, it appeared that in point of time the act of the defendant was not so near the injury as that of the crowd." Summing up the authorities, in section 59, he says: "In other words, it is not necessary to a defendant's liability after his negligence has been established to show, in addition

thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question.” To such effect, see Bishop on Noncontract Law, secs. 45, 46; Davis v. Paducah Ry. etc. Co., 113 Ky. 267, 24 Ky. Law Rep. 135, 68 S. W. 140; 1 Sedgwick on Damages, secs. 128, 129. In section 131 of the latter work it is said: “Where animals sold have an infectious disease known to the seller, but not to the purchaser, which is communicated to other animals of the purchaser, the latter may recover compensation for the damage done to his other animals. The same rule applies where the defendant’s sheep trespass on the plaintiff’s land and communicate disease. And where the defendant’s rams trespassed on the plaintiff’s land, and got his ewes with lamb out of season, so that the lambs died soon after birth, the plaintiff was allowed to recover the diminution in value for the ewes for breeding and other purposes.” In the Clayton case we held that Mrs. Clayton, who took the smallpox from her child, might recover damages therefor on the ¹²³ ground that the purpose of the statute in forbidding the pesthouse being put within one mile of the city boundary was to prevent the communication of contagious diseases to other persons from the pesthouse, and that it was the natural result that the mother should take the disease from the children living in the family with her. It is just as natural, and to be as reasonably expected, that other persons who were members of the family, whether temporarily or permanently, would take the disease. If appellee had been cooking for Mrs. Clayton, whether by day, week or month, and while cooking there had contracted the disease, which had been brought there from the pesthouse, plainly such a result would be no more remote than Mrs. Clayton’s contracting the disease; and no sound distinction can be made between a person who lived in the house for twenty-four hours and one living there longer, if they both took the smallpox while there. The guest was a member of the family as much as the servant would be. And while it was not to be anticipated, perhaps, that a particular person would visit at this house at this time or would be engaged there as a domestic, or be there for any other reason, still it was to be anticipated that persons would come there for various purposes, and the communica-

tion of the disease from the persons living in the house to these persons is a result as naturally to be expected as its communication from one member of the family to another. The purpose of the statute is to require the persons having the contagion of these diseases separated from the rest of the community, so as to prevent the spread of the disease. It was a result naturally to be expected when the statute was violated that the disease would be communicated to the persons living in the neighborhood, and that not only regular members of the family would take it but also those ¹⁹³ who might, for any reason, for the time, be living with them. We therefore conclude that the damages to appellee are not too remote to be recovered for.

On the question of contributory negligence it is conceded that appellee did not know there was any smallpox at the pesthouse, and nothing was shown to justify apprehension on her part that the eruption on the little boy was of a more serious character than his mother supposed.

Judgment affirmed.

Judges Du Relle and Paynter dissent.

A Municipal Corporation maintaining a pesthouse so near private dwellings as to communicate infectious diseases there treated to persons living in the neighborhood is liable to them for injury suffered: See the monographic note to *Missouri etc. Ry. Co. v. Wood*, 93 Am. St. Rep. 849, on the liability of persons communicating contagious diseases to others.

SMITH v. RICHMOND.

[114 Ky. 303, 70 S. W. 846.]

PARTNERSHIP in Unlawful Acts.—If two persons are jointly engaged in maintaining an illegal lottery, and one contributes money to the other with which to bribe public officials in order to secure immunity from prosecution, such persons are partners and one is not the agent of the other. (p. 288.)

PARTNERSHIP in Unlawful Acts—Accounting.—One partner is not entitled to an accounting from the other for money invested in an unlawful purpose, such as maintaining an illegal lottery, especially if such purpose is to violate the criminal laws of the state, and shield offenders from punishment, or to corrupt public officers. (p. 290.)

H. P. Whittaker and M. M. Durrett, for the appellant.

H. Myers, for the appellee.

304 GUFFY, J. This is an appeal from a judgment of the Kenton circuit court in the suit of the appellant against the appellees. The court having sustained a demurrer to the petition as amended, and appellant failing to plead further, his action was dismissed.

The sole question presented for decision is whether the petition as amended stated a cause of action, or, in other words, whether, upon appellant's own showing, he was entitled to relief from a court of equity. So much of the petition as is material to plaintiff's cause of action reads as follows: "2. Now comes W. B. Smith, the plaintiff, and, for his amended petition herein, states that on or before the — day of May, 1890, the defendant, M. J. Richmond, represented to this plaintiff that he, the said Richmond, was the employé and agent of S. T. Dickinson & Co. and their associates, who then were operating and carrying on a lottery business in the city of Cincinnati, Ohio, under the charters of what were known and designated as the 'Kentucky State Lotteries'; that one Louis Davis, since deceased, was at said time and thereafter operating and carrying on a lottery business in said city by permission of the said S. T. Dickinson & Co. and their associates, and of this plaintiff; that this plaintiff was at said time and thereafter operating and carrying on a lottery business in said city as the sole owner of the Colorado State Lottery, for which he had obtained a charter from the state of Colorado; that at said time the said defendant, M. J. Richmond, approached this plaintiff and represented to him 305 that it would be necessary for plaintiff and the said lottery companies represented by said defendant to pay one George B. Cox, a citizen and resident of said city, certain sums of money, in order to procure immunity from arrest and prosecution by the state and municipal authorities of the state of Ohio and said city for operating and carrying on said lottery business aforesaid; that shortly after the said representations so made as aforesaid by Richmond to this plaintiff, to wit, on or about the — day of May, 1890, a meeting was held in the city of Cincinnati, at which plaintiff, said Richmond, acting in his capacity of employé and agent as aforesaid, and Louis Davis were present, and it was then and there agreed that plaintiff should pay one hundred and fifty dollars per month, the companies represented by said Richmond should pay one hundred and fifty dollars per month, and said Davis should pay fifty dollars per month, to said Cox, for the pur-

pose aforesaid; and it was further agreed by and between the parties at said meeting that the several sums above mentioned should be delivered to said Richmond, to be paid by him to said Cox for the said purposes, and this the said Richmond agreed to do. Plaintiff further states that pursuant to said agreement he did deliver to said Richmond in each and every month from May, 1890, to April, 1892, both inclusive, the sum of one hundred and fifty dollars, and that pursuant to said agreement, and on the representation to this plaintiff by said Richmond that it was necessary for plaintiff to pay to said Cox for the purpose aforesaid a further sum of seventy-five dollars per month, plaintiff did deliver to said Richmond in each and every month from May, 1892, to April, 1895, both inclusive, the sum of two hundred and twenty-five dollars; and that pursuant to said agreement this plaintiff did deliver to said Richmond in each and every month from May, 1895, to May, 1897, both inclusive, the sum of ~~200~~ one hundred and seventy-five dollars; making a total sum of money so delivered to said Richmond, to be paid to said Cox for the purpose aforesaid, of sixteen thousand and seventy-five dollars. Plaintiff further states that said defendant, M. J. Richmond, failed to pay said sum of money, or any part thereof to said Cox, and fraudulently converted the same, and all of it, to his own use, and refuses to return said money, or any part thereof, to this plaintiff, although plaintiff has demanded same. Plaintiff reiterates herein each and every allegation of his original and first amended petition, and makes same part thereof."

We copy the opinion of the court below, as one of the means of making a clear statement of the contentions of the parties hereto: "The cause is submitted on demurrer to petition as amended. There are some depositions taken on behalf of plaintiff in the record, but they are not read or considered on this motion. There is no ascertainment of the facts, and the allegations of the petition as amended are taken as true only for the purpose of this demurrer. The facts so taken as true are as follows: In the year 1890, or prior thereto, the plaintiff, Smith, was engaged in the business of conducting a lottery in the city of Cincinnati, Ohio. S. T. Dickinson & Co. were at the same time engaged in the same business in the same city. M. J. Richmond, defendant hereto, was the employé and agent of said Dickinson & Co. One Louis Davis was also conducting the same business at same time and place.

The plaintiff, Smith, and said Davis and said Richmond, representing said Dickinson & Co., held a meeting, at which it was agreed that the several parties engaged in said business should each month pay to said Richmond a certain sum of money, to be applied by said Richmond in bribing and corrupting the authorities of the state of Ohio and of the city of Cincinnati, to thereby procure immunity for those engaged in said business. The ³⁰⁷ said Smith, pursuant to said agreement, paid to said Richmond from May, 1890, to May, 1897, the sum of sixteen thousand and seventy-five dollars, but the said Richmond, instead of using said money in the bribery of Ohio officials (assuming, for the purposes of this demurrer, that such a thing were possible), retained the money and converted it to his own use. This action is instituted by Smith to recover of Richmond said sum of sixteen thousand and seventy-five dollars, and, on demurrer to the petition as amended, the question arises as to whether the law and the courts will furnish relief to one occupying the position held by the plaintiff, Smith. This action is in equity. It is contended by the defendant on this demurrer that where the consideration of a contract is an agreement to hinder, impede or defeat the administration of the criminal or penal laws, the contract is against public policy, is void, and that no party thereto can enforce it by process of law. The plaintiff, on this demurrer, admits the existence of this principle contended for by defendant, but says it applies only as between the parties to such a contract, and does not apply as between one of the parties and his agent, or the agent of all the parties, acting as go-between in carrying out the vicious provisions of the contract. The plaintiff quotes and relies upon the opinion of the Kentucky court of appeals in case of *Martin v. Richardson*, 94 Ky. 183, 42 Am. St. Rep. 353, 14 Ky. Law Rep. 847, 21 S. W. 1039, 19 L. R. A. 692. Martin was the agent of a lottery company. He sold to Richardson some tickets in his lottery, one of which drew a prize; and, while Richardson was ignorant of this fact, Martin induced him to exchange the tickets he held for other tickets, and Martin collected the prize from the lottery company. Richardson sued Martin for the money, and the court of appeals held that he could recover; that, even assuming the purchase and sale of the lottery tickets to have been an illegal transaction, ³⁰⁸ Richardson could not avail himself of that fact as a defense. It seems to me that it would have been strange had the court of appeals held otherwise. The

purchase and sale of the lottery tickets constituted a transaction that was, at most, illegal. The act of Martin in procuring an exchange of the tickets was a crime. The court of appeals simply refused to permit the commission of an act, at most illegal, by one, 'to be pleaded as a defense to the commission of a crime by another.' It refused to permit the commission of a lesser wrong by one to be used as a defense to the commission of a greater crime by another. This opinion in that case is not applicable to the case at bar. The plaintiff quotes and relies upon Wharton on Agency, and the opinions of several state courts, from which it may be assumed to be the rule that an agent who has in his hands money belonging to his principal, on a closed account, cannot set up as a defense, in an action by the principal for money had and received, the illegality of whole or a part of the transaction. In all the extracts from these authorities quoted in brief for plaintiff, the word 'illegal' is used in speaking of the contract. Plaintiff's counsel has not provided this court with the facts of any of the cases he has referred to. The only reference made in any of the extracts set out in plaintiff's brief is to 'illegal' contracts. It appears certain that if Smith had furnished this money to Richmond as his agent for the purpose of conducting a lottery, and that Richmond retained and converted the money, Smith could recover of him, even in a state where the conducting of a lottery was unlawful. But in the case at bar the plaintiff was for seven years continuously engaged not only in conducting an unlawful business, but in attempting, and, as he believes, successfully attempting, to bribe and corrupt the authorities of Ohio and Cincinnati, and to that end he delivered to ³⁰⁰ Richmond over sixteen thousand dollars. For the seven years this plaintiff was engaged in the commission of an act that this court may fairly assume to be a crime in the state of Ohio, the place of its commission. Counsel for plaintiff has not furnished this court a single instance in which any court has given relief to one in such a position, as against a defaulting agent. I believe there is a broad distinction between contracts illegal and contracts criminal, even when considered in reference only to the relations and respective rights of one of the parties thereto and his agent. This plaintiff is asking the law and the courts of Kentucky to aid him in recovering back money that he paid out for seven years, believing it was being used in the bribery of the authorities of a sister state. This does not seem to be the purpose for

which the courts of this state are created or are existing. It is but rarely that such an unblushing confession is seen as in the plaintiff's pleadings in this case. It may be observed that Richmond, in putting this money in his pocket, and keeping it there, although in so doing he defaulted, was guilty of an offense much less than that he would have been guilty of had he carried out the purposes of his principal. In this connection the fact is emphasized that as to Richmond there is no evidence that these things are true, and that they are assumed to be true solely for the purpose of this demurrer. It appears by his own pleading that the hands of Smith are so unclean that he is not entitled to ask any relief in any court, and the demurrer to the petition as amended is sustained. The plaintiff declines to plead further. The petition herein is dismissed, and it is adjudged that the defendant recover of the plaintiff his costs herein, to which plaintiff excepts, and prays an appeal to the court of appeals, which is granted."

It is evident from the pleadings of the appellant that he, ³¹⁰ the appellee Richmond, and Davis were engaged in operating lotteries in the city of Cincinnati, which was a violation of the criminal laws of the state; that in order to procure immunity from arrest and punishment, or, in other words, to corrupt the officers and to defeat justice, they made the agreement set out in the petition, and Richmond was to receive and pay over the money to procure the desired immunity from arrest and prosecution; and that the business was so conducted for about seven years, during which time the sum aggregating sixteen thousand and seventy-five dollars was paid over to Richmond. It may be inferred from the petition that the desired protection was secured, as it is nowhere claimed that the object of the agreement was defeated. Appellant refers to a number of decisions of this and other courts in his two able briefs, which he claims sustains his contention in this case. Upon examination of the various cases, it will be found that they cover what may be called three classes of cases: One is where a party simply employs a man as agent to go and pay money to a third party for an illegal purpose. Another class is where parties may be engaged in an illegal business, and have realized considerable pecuniary profit, in the shape of money or other property, which is in possession of the other party to the crime, in which case some courts hold that such party has in his hands money or property which justly belongs to the other parties, and, although

it is the fruit of illegal business, yet he will not be allowed to have the same simply because the business which procured the property is illegal. The other class is where employ es who are simply the servants employed to carry on and conduct an illegal business will not be permitted to withhold from the owner property which was placed in their hands by him for the purpose of conducting or carrying on such illegal business. The case at bar does not fall within the ³¹¹ rule announced in any of the cases referred to. In this case these parties clearly entered into a conspiracy or partnership for the purpose of enabling them to violate the laws of the state of Ohio, and to corrupt or bribe the officers of the law. These parties were in reality partners in the venture or undertaking specified, and in the general course of business, be it legal or illegal, one of the partners only would handle the money or pay out at a time. In other words, all the parties would not be expected to go together and pay out or receive money together, but the act of one is the act of all. We conclude, therefore, that the transaction set up in the petition must be treated as the formation of a partnership for an illegal purpose, greatly to be condemned from any standpoint. A corruption of the authorities of a great state or city should not be tolerated. The payment of money to defeat the enforcement of the criminal laws is one of the most heinous of crimes, and no court should afford any relief to the parties engaged in such a nefarious business. The operation of lotteries is by common consent regarded as contrary to public policy, and highly immoral, and this plaintiff had added to that unholy business a still greater crime of bribing public officers, and paying money to prevent the enforcement of the criminal laws of a sister state. Both parties, according to the petition, are guilty of a great crime; and the court should not hear the complaints of either in respect to the illegal business conducted by them. To allow such would, in effect, be to wink at, if not to sanction, the most corrupt of practices. We think the opinion of the court below is in accord with nearly all, if not quite all, the authorities respecting such transactions, and in accord with the principles announced in the recent case of *Central etc. Safe Deposit Co. v. Respass*, 112 Ky. 606, 99 Am. St. Rep. 317, 23 Ky. Law Rep. 1905, 66 S. W. 421, 56 L. R. A. 479. To allow ³¹² the appellant to recover in this case would, in effect, be saying to all parties that "you can go on with reasonable safety, furnish money to a person for illegal and criminal

purposes, and, after you have derived the benefit therefrom, sue the so-called agent and recover back the money, unless he, perchance, was able to prove to the satisfaction of the court that he in like manner had paid over the money for the said unlawful purposes." As before stated, we do not think that Richmond was the agent of plaintiff, in the legal sense of agency, but was simply one of the partners in crime; and we know of no court that has ever sustained a suit of one partner for an accounting for money invested in an unlawful purpose, especially if such purpose was to violate the criminal laws of a state, and shield offenders from punishment, or corrupt public officers.

Judgment affirmed.

The Liability of One Partner in an illegal partnership to account to his copartner is discussed in the monographic note to Central etc. Safe Deposit Co. v. Respass, 99 Am. St. Rep. 326-329.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY v. HENDON.

[114 Ky. 501, 71 S. W. 435.]

TELEPHONE COMPANIES—Wrongful Discontinuance of Service.—Measure of damages against a telephone company for wrongfully disconnecting a telephone on account of a mistake as to the payment of rent, is such sum as will compensate its patron for the injury caused by the breach of the contract. He is not entitled to recover punitive damages. (p. 291.)

TELEPHONE COMPANIES—Wrongful Discontinuance of Service.—Measure of damages against a telephone company for wrongfully discontinuing its service to a patron is, in the absence of proof of specific loss, the amount paid for the service for the time during which it is refused. (p. 292.)

Fairleigh, Straus & Eagles, for the appellant.

Payor & Sapinsky and O'Neal & O'Neal, for the appellee.

308 HOBSON, J. Appellee, Hendon is a physician, living in Louisville. He was a patron of the appellant the Cumberland Telephone and Telegraph Company, and had one of its instruments in his office. Appellant discontinued the telephone from 3 o'clock P. M. of October 23, 1900, to 8:45 A. M. the next morning, or something less than eighteen hours, and

this action was brought to recover damages therefor. The reason that the telephone was disconnected was that the bookkeeper made a mistake in posting the amount paid. His book did not show that Hendon had paid for the month of September, although he had in fact paid. On October 22d, a notice was sent to him that his 'phone was discontinued for this reason, and he, having paid no attention to the notice, twenty-four hours afterward the connection at the office was severed, although the instrument was not removed. When he got home at 6 o'clock that evening and found that he had been cut off, he tried to 'phone to the office, but failed to get them. The next morning he went down, the mistake was at once corrected, and the instrument was no longer discontinued. The proof showed that he had not only paid for September, but had also paid in advance for October, November and December. It also showed that one person who needed the doctor for his wife that night, being unable to reach him by 'phone, walked to his office and waked him up. It also showed that three other persons who wished to talk with him were unable to reach him on the 'phone, and that, when one of them asked at the office what was the matter, the assistant manager answered that his 'phone had been discontinued for nonpayment of rent. It is not shown that he suffered any pecuniary loss by the suspension of the service, although it would seem that he was considerably annoyed about it. On these facts, the jury ⁵⁰³ found for him a verdict for two hundred dollars, on which the court entered judgment. The court instructed the jury that they should find for the plaintiff at least nominal damages, and, if they believed from the evidence he suffered inconvenience by reason of his telephone service being discontinued, then they should further find for him such sum as would fairly and reasonably compensate him for the inconvenience so sustained. There was nothing in the case to warrant an instruction on punitive damages, and the court properly refused to instruct the jury on this subject. The plaintiff had by contract acquired the right to a certain service, and, this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract but an actual tort. The proper measure of damages to compensate for the breach of the contract is a matter of some difficulty, and we have been referred to no authorities directly,

in point. Where the contract is to deliver a specific message, and is broken, the measure of damages has been often adjudicated, and we see no reason why the same principles should not apply to the case before us, for the contract here was in substance an undertaking to convey all messages the subscriber might wish to send or others might wish to send to him over appellant's line, within the time paid for by him. In the absence of proof of special damage for the failure to carry a message, the recovery would be limited to the amount paid for the service which was not furnished. Mere inconvenience or annoyance cannot be recovered for except in peculiar cases: 25 Am. & Eng. Ency. of Law, 855-863; Chapman v. Western Union Tel. Co., 90 Ky. 265, 12 Ky. Law Rep. 265, 13 S. W. 504 880. Where there is a contract, not for specific message, but for the carriage of all messages within a certain time, the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused. In case of special damage, this, in addition, may be recovered under proper averments: Robinson v. Western Union Tel. Co., 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611. Under the evidence, the court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his 'phone was discontinued, taking for the basis the amount paid by the month, and allowing for the time lost such part thereof as they deemed right.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

A Telephone Company is a quasi common carrier of news, and is bound to supply all alike with similar facilities who are in like circumstances: State v. Citizens' Tel. Co., 61 S. C. 83, 85 Am. St. Rep. 870, 39 S. E. 257, 55 L. R. A. 139.

MORELAND v. CITIZENS' NATIONAL BANK.

[114 Ky. 577, 71 S. W. 520.]

BILLS AND NOTES—Noting of Protest.—The words, "protested for nonpayment," indorsed by a notary on a bill of exchange, together with the day of the month and year and the signature of such notary, are a sufficient noting of protest. (p. 294.)

BILLS AND NOTES—Noting of Protest.—If a bill of exchange has been protested for nonpayment and notice has been given to the drawer and indorser, the noting of protest having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser is fixed, and the destruction of the paper upon which the noting of protest was done, whether it was purposely or accidentally, does not invalidate the protest. (pp. 294, 295.)

BILLS AND NOTES—Insolvency—Notice of Protest.—If between the drawing and maturity of a bill of exchange the accommodation drawer makes an assignment for the benefit of creditors, notice of protest of the bill to him alone is sufficient. (p. 296.)

BILLS AND NOTES—Maturity.—Bill of Exchange containing the words, "one hundred and eighty days pay to the order of," becomes due and payable one hundred and eighty days after date. (p. 296.)

APPELLATE PRACTICE.—Exceptions to the report of a master in chancery cannot be made for the first time in the appellate court. (p. 297.)

W. S. Prior and Walker & Slack, for the appellant.

J. A. Dean, for the appellee.

see PAYNTER, J. The issue herein arises over certain bills of exchange. There is no issue as to the drawing, acceptance and indorsement of them. In this action it is sought to hold the accommodation drawer and indorser responsible on them. The payment is sought to be avoided by the drawer and indorser of same on the grounds that the law was not observed in noting protest, giving notice of protest, and writing the instruments of protest by the notaries public. Two of the bills over which there is a controversy are for \$5,000 each, one for \$3,685, one for \$3,000, and one for \$3,200. These bills were drawn by J. P. Moreland, accepted by S. D. Walden, and indorsed by J. P. Fuqua. It appears that the bills (unless the one for \$3,685 was not) were protested on the days that they matured. As to that bill it is insisted that it was not protested until the day after its maturity. That defense is interposed in addition to the others heretofore stated. I. N. Parish, notary public, protested the bills for \$5,000 each on the days

of their maturity, and indorsed on them, "Protested for non-payment," and, in addition to that, gave the day of the month and year, to ⁵⁸¹ which indorsement he affixed his official signature. W. H. Moore was the notary who protested the bill for \$3,000 and the one for \$3,200. No memorandum noting the protest was left attached to either of the bills by the notary, nor was such indorsement made upon them. Either on the day the bills were protested or on a subsequent day the instruments of protest were written, but the evidence leaves no doubt that the notices of protest were duly mailed to the drawer and indorser of the several bills on the days they were protested.

The first thing which we will consider is whether the noting by Parish was sufficient. The authorities seem to be agreed that the noting of initial protest was unknown to the law as distinguished from the protest, but that it has grown into practice within recent years. It seems to be well established that, if the instruments of protest are not written shortly after the demand and protest, the noting or initial protest is necessary as a basis for the instrument of protest: 2 Daniel on Negotiable Instruments, 4th ed., sec. 939. This court in *Read v. Bank of Kentucky*, 1 T. B. Mon. 39, 15 Am. Dec. 86, had under consideration the question as to the necessity of noting. The court said: "The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment." The court seemed to be of the opinion that, if the instrument of protest was written as soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment, then those sought to be held liable were bound. We are of the opinion that the indorsements which Parish made on the bills were sufficient.

The facts as to the bills protested by Parish differ somewhat from those protested by Moore. We will not go into ⁵⁸² the discussion of the question of the competency of evidence to prove the course of business of notaries in protesting paper; neither is it necessary for us to determine whether the instruments of protest were written on the day the bills matured, or on a subsequent day; hence, the necessity is obviated of determining whether the proof is sufficient to impeach the dates of the instruments of protest, they bearing dates that the bills matured. If the noting of protest was made, the instruments of protest could have been prepared thereafter. Moore tes-

tified that when he protested the bills he attached to each of them a memorandum showing the protest, but when the instruments of protest were written he destroyed it, as he had no further use for it. Counsel for appellee urges that the preservation of these slips was essential to the validity of the protest in extenso, as they form a necessary part of the record in establishing the steps that must be taken in order to fix liability upon the drawer and indorser. The object of noting is to have a record from which the instrument of protest can be written, so a notary will not be required to rely upon his memory as to the facts. If the noting was made, the destruction of it, whether it was purposely or accidentally done, could not invalidate the instrument of protest which was based upon it. It preserves the right of the notary to prepare that instrument, and when done, the essential steps have been taken to fix the liability upon the accommodation drawer and indorser. The bill having been protested for nonpayment and notice having been given to the drawer and indorser, the noting having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser was fixed. The destruction of the paper upon which the noting was made could not relieve them of the ^{own} liability that had attached by the necessary act of the notary.

After the several bills were drawn, and before their maturity, Moreland made an assignment to E. P. Taylor for the benefit of his creditors. When the bills were protested, notices of protest were not sent to the assignee but to Moreland. It is insisted that, as the assignee accepted the trust and qualified as such assignee, notices of protest should have been given to him instead of to Moreland, in order to bind the trust estate. The exact question here presented has not been before this court, although this court, in *Callahan v. Bank of Kentucky*, 82 Ky. 231, 6 Ky. Law Rep. 188, held that notice of the dishonor of a bill to one who is the assignee of the payee was sufficient. But the court said: "We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case." The text-writers upon this question are extremely unsatisfactory. 1 *Parsons on Notes and Bills*, 500, in speaking of the person to whom notice of protest should be given in the case of a bankrupt, says: "That perhaps the notice should be given to the assignee, if the holder

knows or might know, by the exercise of due diligence, that the estate is in his hands"; but he adds: "But notice might perhaps even then be sufficient if given to the bankrupt." Byles on Bills, page 216, says: "If the drawer of the bill become bankrupt, notice must nevertheless be given to him, in all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them." Daniel on Negotiable Paper, section 1002, says: "If the party be bankrupt, it is best to give notice to him, and to his assignee also. If there be yet no assignee appointed, notice to him ⁵⁸⁴ is sufficient, and perhaps it might be sufficient, even if one had been appointed. If given to the assignee alone, it would probably be sufficient." When a party assigns all of his property for the benefit of his creditors and places it in the hands of a trustee for distribution, all of his creditors are entitled to participate in the distribution of it. This is true whether the debts have matured or not. Moreland's liability on these bills existed at the time of the assignment, and, if it was preserved, then the holder of them was entitled to participate in the distribution of the proceeds of the assigned estate. He being personally liable to the holder, it was important to it that he receive notice of protest that that liability might be preserved. When that liability was preserved, it seems to us to necessarily follow that the holder of the bills is entitled to participate in the trust estate, because the very purpose of his assignment was to pay his liabilities in full or pro rata, as the case may be. We conclude that notice to Moreland was sufficient to preserve his liability, and, if his liability continued, there is no escape from the conclusion that the holder of the bills which evidenced it was entitled to participate in the distribution of the estate.

The bill for \$3,685 reads as follows: "Citizens' Savings Bank, Owensboro, Ky., Mch. 29, 1892. \$3,685.00. No. 14,773. One hundred and eighty days pay to the order of J. A. Fuqua, negotiable and payable at Citizens' Savings Bank, thirty-six hundred and eighty-five dollars, for value received, with interest at ten per centum per annum after maturity, until paid, and charge to account of J. P. Moreland. To S. V. Walden, City." The note was protested upon the idea that the bill was payable one hundred and eighty days after date. It is insisted for the appellant that it was due within one hundred and eighty days. In our opinion, the words import that the bill was due ⁵⁸⁵ one hundred and eighty days after date.

It is often necessary for a court, by construction, to supply words obviously omitted through oversight, to give an instrument the meaning manifestly intended. In order to construe it as meaning within one hundred and eighty days, we would have to supply the word "within." We know, from the customary way of drawing such instruments, that they are usually payable at the time specified after the date upon which they are drawn. The parties did not mean that the money should be paid on or before one hundred and eighty days, and, if we should hold that it was to have been paid within one hundred and eighty days, we should, in effect, hold that it was to be paid on or before one hundred and eighty days.

The commissioner to whom the case was referred to purge the bills of usury made a report showing that he had done so. No exceptions were filed to the report, and no question made as to the correctness of it, except in the brief in this court. It is too late to raise the question. It was the duty of the appellants, had there been a correction which should have been made in the report of the master commissioner, to have called the lower court's attention to it, so that he could have had an opportunity to make the correction. Besides, we fail to find an error in the report of the master commissioner.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

Notice of Protest must be given to an indorser, according to *House v. Vinton Nat. Bank*, 43 Ohio St. 346, 54 Am. Rep. 813, 1 N. E. 129, although he has made a general assignment for the benefit of creditors. Other authorities take the view that notice to the assignee will bind the indorser: *Callahan v. Bank of Kentucky*, 82 Ky. 231; *American Nat. Bank v. Junk Bros. Lumber etc. Co.*, 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. In *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165, it is held that notice to the indorser is sufficient, where he has made a general assignment in another state, of which the payee is ignorant. See, too, *Casco Nat. Bank v. Shaw*, 79 Me. 376, 1 Am. St. Rep. 319, 10 Atl. 67.

On Noting and Extending Protest by notaries public, see the note to *Dupre v. Richard*, 43 Am. Dec. 223.

WALLS v. HOME INSURANCE COMPANY.

[114 Ky. 611, 71 S. W. 650.]

INSURANCE, Fire—Waiver of Payment of Premiums.—If a person, upon insuring his property, gives notes for the payment of deferred premiums, under a policy providing that if any installment of premium is not paid when due, the insurer shall not be liable for loss during such default, and that the policy shall lapse until payment is made, and the insurer upon the delinquency of the insured in the payment of an installment of the premiums, retains the notes, demands payment, and continues to demand payment in full of such installment at different times and until long after it is due, he thereby waives the conditions in the policy providing for lapse thereof during default, and continues the policy in force. (pp. 301, 302.)

INSURANCE—Check as Payment of Premium—Evidence.—If a check is sent as payment of an installment of premium on an insurance policy, but is not received nor accepted as payment, nor pleaded as such, nor ever paid, and the insured did not at any time after the check was drawn have funds in the drawee bank, sufficient to pay it, the mailing and sending of the check is not payment of the installment of premium due, but in an action to recover on the policy, evidence of the mailing of such check is admissible to show that the insured had not abandoned his contract, and that he considered himself bound thereon. (p. 302.)

J. W. Lewis, for the appellant.

W. C. McChord, for the appellee.

613 O'REAR, J. Appellant, Walls, effected a contract of insurance upon his dwelling-house and contents with appellee insurance company for a term of years upon the plan of paying the premiums in annual installments. The first premium was paid in advance for the first year's insurance. Appellant, when taking the insurance, executed to appellee a note for thirty dollars for the aggregate of the four remaining years of the term. An equal part, to wit, seven dollars and fifty cents, was to be paid the first day of June of each year, and in advance for the insurance for that year. The note contained this additional stipulation: "And it is hereby agreed that, in case any one of the installments herein named shall not be ⁶¹⁴ paid at maturity, or if any single payment promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium for said policy shall not be paid promptly when due, this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company at the Western Farm Department at Chicago; and in the event of nonsettlement for time expired as per terms on

short rates, the whole amount of installments or notes remaining unpaid on said policy may be declared earned, due and payable, and may be collected by law." The policy contained an expression of the same idea, and other conditions relating thereto in this language: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for the premium upon this policy remains past due and unpaid, or while any single payment promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium remains past due and unpaid. Payments of notes and installments thereof must be made to the said Home Insurance Company at its Western Farm Department office in Chicago, Illinois, or to a person or persons especially authorized to collect the same for said company. . . . The company may collect, by suit or otherwise, any past due notes or installments thereof, and a receipt from the said Chicago office of the company for the payment of the past due notes or installments must be received by the assured before there can be a revival of the policy, such revival to begin from the time of such payment. . . . This company reserves the right to cancel this policy or any part thereof by tendering to the assured the unearned pro rata premium, after due notice to that ⁶¹⁵ effect, either by mail addressed to the assured at his, her or their postoffice address as named in this policy or otherwise. The assured may also cancel when the premium or note or obligation given for such premium has been actually and fully paid in cash, in which case the company shall retain the expense of writing, procuring and taking the risk, and the usual short rates from the date of the policy up to the time it is received for such cancellation." There is contained in the policy this further expression: "This contract being based upon the mutual good faith of the parties hereto, it is agreed," etc. The installment due June, 1900, was not paid. Appellee retained the note. Appellant retained the policy. Appellee wrote appellant to pay the installment after it was due and default had been made. In the following July appellee had sent the note to its agent at Springfield, near appellant's postoffice address, with instructions to collect the note. The agent sent appellant three notices. The agent's evidence on this point is as follows: "Q. Did you notify Mr. Walls? A. I sent him three notices. Q. What was the substance of

them? A. That his installment due on the 1st of June, 1900, was in arrears, and that if he would send me the money, I would have the company send him a receipt. That is about the way I send the first two notices usually. I always use about the same form. I don't remember the words exactly. In the last notice I sent him—in January, I reckon—I notice that I turned the note back to the company about the latter part of January. I have the receipt for the note. I wrote them that I could not collect it—I told him that he would have to pay it, or I would send it in to the company, and let them put it out for collection." Appellant failed to respond to these notices until March 19, 1901, when he mailed to appellee's ⁶¹⁶ agent at Springfield a check on the People's Deposit Bank of Springfield for seven dollars and fifty cents. It seems to be pretty clearly established that this check was mailed at appellant's postoffice, but that it was not received by the agent. Certain it is that it was not presented to the bank nor paid. On March 23, 1901, the insured house was destroyed by fire, and the contents destroyed, or badly damaged. Upon this state of facts the court, at the conclusion of the evidence, ordered a verdict for appellee.

The correctness of these instructions depends upon whether appellee had waived the conditions of its policy and of the note that the policy should lapse, and the company not be liable for loss, during default in the payment of the premium. It will be observed that the insurance company not only retained the note executed by appellant for the premium after it was due, but that it unconditionally requested the payment in full of that part of the note which represented the whole premium for the year beginning June 1, 1900. Nothing was said at the time concerning the company's claim that the policy was lapsed, or that the company's liability thereon was suspended during such time as the premium was unpaid. Nor was there coupled with the demand any statement by the company limiting its liability to future insurance, and denying its liability for the time intervening since the default in the payment of premium. In *Moreland v. Union Cent. Life Ins. Co.*, 104 Ky. 129, 20 Ky. Law Rep. 432, 46 S. W. 516, there had been default in the payment of the insurance premium past due, evidenced by the note of the assured, the policy containing a provision that the failure to pay any of the first three installments, or notes, or interest upon the notes given for any of said premiums on or before the days on which they became due, should void and

nullify the policy without ⁶¹⁷ action on the part of the company. The company in that case retained the premium note after its maturity, and made an unconditional demand for its payment, and, indeed, placed in the hands of its attorneys for collection. The court formulated these two questions in that case as the propositions between which the law must make choice in giving construction and effect to such act on the part of the insurance company, namely: "The question is, Can the company insist on payment of the note, and at the same time consistently say that the policy, having been forfeited by its nonpayment, remains forfeited? Or will not the real intention of the parties be effected by holding that, although the policy was forfeited by this nonpayment, yet, as the retention of the note and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture, therefore the forfeiture is to be deemed waived?" The court chose the latter, not being able to find satisfactory legal principle upon which the company might "insist on the one hand on the insured complying with his part of the contract, and on the other insist that the contract is a dead one." The court held, too, that all the insured was required to do after the default in premium under such condition, if it did not wish to continue its liability under the policy, was to so act that its conduct would not be inconsistent with the claim of nonliability. Counsel for appellee here puts the question: Cannot these parties make such contract as is suitable to themselves, and may it not be enforced according to its terms? Their right to contract is not limited in respect to the terms of the insurance. While parties may contract with reference to insurance, they may also waive conditions of their contract. The question here presented is: Has the insurer waived that condition of its contract ⁶¹⁸ of insurance providing for lapsing of the policy upon default in payment of the premium? That the insurer could not be compelled to carry this liability under the contract without payment in advance is not to be doubted. On the other hand, if it saw proper to carry the liability without the payment of the premium in advance it could do so. Here the premium had been in default from June until January following, when the company was insisting upon the payment of the whole of the premium for the current year. Nothing would be owing the company for the time from June 1, 1900, until the dates of the respective demands for the payment of the premium thereafter, if, as a matter of fact, the policy had lapsed, and

the company was not bound thereon, because, manifestly, if the company was not bound for the loss in case of fire, the insured was not bound for the payment of the premium during such time. On the other hand, if the insured was bound for the payment of the premium, and was so treated by the company, and acceded to by the insured, then it must follow that the company was bound upon its policy; for that, and that alone, could uphold as a consideration the promise and obligation of the insured to pay the premium. As said in the Moreland case, *supra*, the action of the company in demanding unconditionally the payment of the note was an act inconsistent with the idea that the policy had lapsed, and that it was not bound thereon. The same principle was approved and applied by this court in *Moore v. Continental Ins. Co.*, 107 Ky. 273, 21 Ky. Law Rep. 977, 53 S. W. 652. We are of opinion that the conduct of appellee amounted to a waiver of the conditions of the policy providing for the suspension of its liability after default in the payment of the premium until the premium should be paid.

It is claimed by appellant that the mailing of the seven dollars and fifty cents ⁶¹⁹ check heretofore referred to was in law a payment of the premium due June 1, 1900. It was shown by the testimony of appellant and by the postmaster at whose office the letter was mailed that the check was filled out and signed and placed in an envelope, properly addressed, and that it was placed in the mail pouch. It is claimed that after the necessary time had elapsed for it to have reached the addressee in due course its receipt and acceptance will be presumed, and it will be adjudged that the facts stated constituted a payment. This contention cannot be sustained in this case for the following reasons: 1. It was not pleaded that the premium had been paid; 2. It was not shown that appellee's agent received or accepted the check in payment; 3. The check was not in fact paid, nor presented to the bank upon which it was drawn; nor 4. Did appellant have at the time, or any time thereafter before the fire, enough funds in the bank to his credit to have paid the check. However, the fact that appellant sent the check under the circumstances stated by him was relevant as tending to show that he had not abandoned his contract, and that he considered himself bound thereon.

But for the reasons indicated, the judgment must be reversed, and the cause remanded for a new trial under proceedings not inconsistent herewith.

The Right to Declare a Forfeiture of an insurance policy for the nonpayment of premiums may be waived, and the waiver may be manifested by conduct as well as by words: *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 21 Am. St. Rep. 203, 25 N. E. 126, 9 L. R. A. 317. See, too, *McQuillan v. Mutual Reserve etc. Assn.*, 112 Wis. 665, 88 Am. St. Rep. 986, 87 N. W. 1069, 88 N. W. 925. Forfeiture for the nonpayment of a premium note is inconsistent with a subsequent demand for the payment of the note, and a notice that if not paid suit will be brought thereon: *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 39 Am. St. Rep. 316, 52 N. W. 509.

MOAYON v. MOAYON.

[114 Ky. 855, 72 S. W. 33.]

HUSBAND AND WIFE—Consideration for Contract Between. If husband and wife are living apart and she has sufficient ground for divorce and has prepared a petition therefor, her forgiving him and the resumption of marital relations is sufficient consideration for his agreement to convey property for their children: (p. 309.)

SPECIFIC PERFORMANCE.—It is No Defense to specific performance of one's contract, otherwise fair, to sell an undivided interest in his land, that his vendee may sell the interest to some undesirable person. (p. 309.)

HUSBAND AND WIFE—Specific Performance of Husband's Contract—Mutuality of Remedy.—If a husband and wife living apart, she having a ground for divorce, mutually agree to again live together as husband and wife, and he, in consideration therefor, agrees to convey property for the benefit of their children, and marital relations are resumed between them prior to the execution of such conveyance, it is no defense to specific performance of his contract to convey, that there is no mutuality of remedy because he cannot thereafter compel his wife to live with him. (p. 312.)

STATUTE OF FRAUDS—Contract to Convey.—A contract by a person to convey one-third of his estate of whatever nature acquired under his mother's will, or otherwise acquired or owned by him, sufficiently describes the property to be conveyed to satisfy the statute of frauds. Such property may be identified by parol evidence. (pp. 314, 315.)

HUSBAND AND WIFE—Contracts Between.—If a contract between husband and wife, by which he agrees to convey property for the benefit of their children, is just and reasonable, and would be good at law if made by the husband with a trustee for the wife, it will be upheld and enforced in equity. (p. 315.)

Hunter, Wood & Son, Kohn, Baird & Spindle and Barker & Woods, for the appellants.

J. C. Duffy and Landes & Allensworth, for the appellee.

see O'REAR, J. Appellant, Birdie Moayon, and appellee, Max Moayon, are husband and wife. They have two children,

who are infants. The Fidelity Trust and Safety Vault Company is the guardian of these children. Prior to December 4, 1900, there was a separation of these parties on a ground, as is alleged, which entitled the wife to a divorce a vinculo. It is not material to this decision as to the nature of this cause. The wife had retained counsel, who had prepared for filing a petition for divorce from appellee. On the 4th of December, 1900, at the instance of appellee, the parties treated for a settlement of their differences, resulting in a contract in writing between them, which we copy in full, as follows:

"This agreement, made and entered into this fourth day of December, 1900, by and between Max J. Moayon and his wife, Birdie Moayon, and the Fidelity Trust and Safety Vault Company, trustee for Beatrice and Jessamine, children of the said Max and Birdie Moayon, witnesseth: That whereas, the said Max and Birdie are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day agreed mutually to forego their differences, and to be reconciled, and live with each other as husband and wife, after the full execution of this agreement. Now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education and support, and the ^{and} future welfare, now in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar in cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the acceptance of the trust by said Fidelity Trust and Safety Vault Company under this agreement, the said Max Moayon hereby agrees to convey, transfer and deliver in fee simple to the Fidelity Trust and Safety Vault Company, as trustee for the use and benefit of the said Beatrice and Jessamine Moayon, his children, one-third of all his estate, real, personal or mixed, of whatever kind or nature belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him; the said personal property to be delivered according to the rules of law, and the real estate to be conveyed by deed properly acknowledged and recorded as soon as the deeds can be prepared. The absolute estate is to be conveyed to said trustee for the use and benefit of the said chil-

dren, and in the event of the death of either of said children the estate of such child shall go to and belong to said Birdie Moayon, for her own sole and separate use forever. Said trustee shall have the authority to collect all income from said estate so conveyed, and pay the same over to the said Birdie Moayon for the use and benefit of the said children's care and education. She shall not be required to render any account of the moneys thus received by her, but her receipt shall be an absolute acquittance of the trustee. Said trustee shall be authorized to convey, sell, exchange or dispose of any part of the estate so conveyed, and transfer a fee simple title, whenever the said trustee deems it proper to do so, and conveyance by the said ³⁶³ trustee shall convey the fee simple title, and the said trustee shall hold the proceeds received from any such conveyance for the same use, purposes and to the same extent and in the same manner as the original estate is held under this agreement. It is agreed between the parties that within ten days a full inventory of all the estate of the said Moayon shall be delivered to the said Birdie Moayon and said Fidelity Trust and Safety Vault Company, and the deeds executed in accordance with this agreement, and the transfers of personalty made in accordance with the terms of this agreement and to carry into full effect the same. Witness the hands of the parties this 4th day of December, 1900, at Louisville, Kentucky.

"MAX J. MOAYON.

"BIRDIE MEYERS MOAYON.

"The Fidelity Trust and Safety Vault Company joins in the foregoing arrangement for the purpose of signifying its acceptance of the trust to be created by the deed of conveyance contemplated by its terms.

"FIDELITY TRUST AND SAFETY VAULT COMPANY.

"By JOHN W. BARR,
"Vice-president."

The foregoing facts are gathered from appellant's petition filed in this case seeking a specific performance of the above contract, it being also alleged that in pursuance thereto appellant Birdie had forgiven the wrongs of appellee, and had returned to his home, and resumed her relations as a dutiful wife; and from the date of this contract, and in performance of her part thereof, had continued to live with appellee as his wife, and was yet doing so. It was also averred that appellee

had wholly failed to comply with his part of the agreement, the one above copied, and that he refused to do so. A full description of his property, alleged to be that intended by the parties to be and that was embraced in the terms of the written contract, was given in the petition. It shows a number ⁸⁶³ of pieces of real estate in Christian county, this state, and personal property of the value of about twenty thousand dollars. Appellee interposed a demurrer to the petition, which was sustained, and the petition dismissed.

In support of the judgment it is argued that the contract is unenforceable for the following reasons: 1. That it is not founded upon a valuable consideration, and that it is disfavored upon principles of sound public policy; 2. That it is indefinite and uncertain, and inequitable and unreasonable; 3. That it is lacking in mutuality of obligation and remedy on the part of the wife; 4. That the description of the property to be conveyed is not sufficiently certain, nor is it sufficiently identified to satisfy the statute of frauds; 5. That the wife cannot contract with her husband concerning her property rights, nor can she sue him therefor, other than in an action for divorce and alimony. As a determination for appellee of any one of the questions just outlined must result in an affirmance of the judgment, we will take them up and discuss and dispose of them in the order stated.

1. It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray ⁸⁶⁴ the cost of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satisfaction will constitute a consideration to support a contract based upon that fact: *Clarke v. McFarland*, 5 Dana, 48; *Brown v. Buford*, 3 B. Mon. 508, 39 Am. Dec. 477; 6 Am. & Eng. Ency. of Law, 2d ed., 947, and cases. Nor is it even necessary

that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration: *Ford v. Crenshaw*, 1 Litt. 70; *Gaines v. Scott*, 3 Ky. Law Rep. 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state); and that, therefore, there is nothing upon which to rest ^{see} the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid: *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky. 510, 14 Ky. Law Rep. 628, 20 S. W. 605. Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce: *Gaines v. Poor*, 3 Met. (Ky.) 503, 79

Am. Dec. 559. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, a fortiori must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation: See Bishop on Marriage, ⁸⁶⁶ Divorce and Separation, sec. 1279. As said in *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other." To same effect is the case of *Phillips v. Meyers*, 82 Ill. 70, 25 Am. Rep. 295. In *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurances and promises, she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife it is not only partially, but entirely, performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue." In ⁸⁶⁷ addition to the foregoing, we think the principle is also sustained by the following authorities: *Smith v. Smith*, 35 Hun, 378; *Shepard*

v. Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396; Casto v. Fry, 33 W. Va. 449, 10 S. E. 799. We are consequently of opinion that the contract was based upon sufficient consideration, and is not opposed to a sound public policy.

2. That the contract is definite, certain, fair and equitable, we have no doubt. The wife agrees to abandon, and it is alleged has abandoned, her suit for divorce, and has forgiven its cause. She agrees to resume the wifely relation, and has done so in pursuance to the agreement. The husband undertook, besides his promise of a fulfillment of the conjugal duties, to convey to a named trustee one-third of all his property for the maintenance and education of their two children; it in event of their death to go to the wife. It also was provided for the management of the trust. The only serious criticism of the paper as to its indefiniteness or lack of equity, besides the matters of description and mutuality, which will be discussed further on, is the suggestion that it is unfair and inequitable to appellee to enforce a contract that may let into joint ownership with him in his property, and in his mercantile establishment, other persons probably not desirable, and whose interference would jeopardize, if not destroy, the value of his business. As to the real property, it not infrequently happens that it is owned jointly by persons of incompatible tastes. Yet we have never before heard it urged as a defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person entailing probably a disastrous suit to ~~see~~ sell the whole property because of its indivisibility. Those are questions that might properly influence one in determining whether he will sell an undivided interest in his property. But after he has contracted to do so for an adequate consideration, we perceive no reason why equity should relieve him from a specific execution of his contract on such a ground. Upon the face of the contract, it does not appear to us to be unfair. It settles upon the wife's children certainly no more than the allegations of her petition show would probably have been set apart to her as alimony, had she prosecuted her suit. That she saw proper to have this sum settled on her children, instead of upon herself, is not a ground for objection by appellee.

3. It is very earnestly argued that the contract should not be enforced because of lack of mutuality in obligation and in remedy. It is asserted by appellee that, before a contract will

be specifically enforced in equity, it must not only be reasonable and practicable, and supported by an adequate consideration, and be certain and definite in regard to the property to be conveyed, but it must be mutually binding upon the parties, and the remedy for its enforcement must also be mutual to the parties. It is the latter condition that we now address ourselves to. We concede the correctness of appellee's proposition. Yet it may be satisfied with less than an ideal fulfillment of its full text. For example, it is generally held that, under the statutes of frauds and perjuries, where the contract is not in writing, if one party, relying on the agreement, and induced thereby, has executed his part of the contract, the other party may be compelled to perform, or to respond in damages, if specific performance is withheld. Not to do so would be to make the statute enacted to prevent frauds an instrument for effectuating a fraud. ³⁶⁹ To examine minutely that part of the agreement bearing on this question, we again quote from it: "Whereas, the said Max and Birdie Moayon are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day mutually agreed to forego their differences, and to be reconciled and live with each other as husband and wife after the full execution of this agreement: Now, in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them, and for their maintenance, education and support and future welfare: Now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid," etc. We have not rested this contract on the consideration of the "love and affection" of the father to his children (though it seems that might alone have been sufficient in this state) any more than upon the one dollar recited as having been paid. In the case of an executed contract, reciting several matters as constituting the consideration, if any one of them is sufficient, probably that would satisfy the inquiry. But in an executory contract, the execution of which is resisted by one of the parties, the inquiry should embrace all the matters recited as the consideration, because we cannot say that the complaining party would have entered into the contract in the absence of any of the matters recited as the moving consideration for his action. The consideration of this contract may be thus stated: (a) The mutual agreement to forego differences; (b) The

mutual agreement to be reconciled; (c) The mutual agreement to live with each other as husband and wife; (d) ⁸⁷⁰ Love and affection of the husband for his children; (e) One dollar. The last two are not questioned. Appellant, Mrs. Moayon, did forego the cause of their difference. That part of the contract is unquestionably executed. She did become reconciled to appellee. That is executed. The only remaining part of the contract is (c) "the mutual agreement to live with each other as husband and wife after the full execution of this agreement." The parties saw proper to anticipate the time of execution of this clause of the contract, and resumed their living together before the full execution of the agreement. This was necessarily by mutual consent, and neither party can take advantage by complaint of that act. The case is rested, however, on this point, upon the argument by appellee that the contract contemplated not merely going back to their former relation, but permanently continuing in it; that the wife's undertaking on this score cannot be fulfilled short of the death of one of the parties, for, so long as they both live, she might leave him. It is then argued that, so long as she owes him any part of this undertaking (i. e., to live with him as his wife), it is a duty that could not be enforced against her by the court; that no civil court ever has attempted to compel two people to so live together, no matter which was in fault. Therefore, it is claimed there is lacking that mutuality of remedy necessary to the enforcement in equity of this contract. Marriage contracts and marriage articles have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation—to live together as husband and wife—in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain ⁸⁷¹ property or money. If they, in pursuance of the agreement, did marry and live together as husband and wife, the contract has been considered always as executed, so far as that part of the undertaking was concerned. It has been held that neither misconduct of a party after marriage (*Moore v. Moore*, 1 Atk. 272; *Sidney v. Sidney*, 3 P. Wms. 269; *Seagrave v. Seagrave*, 13 Ves. Jr. 439; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551), nor the subsequent divorce of the parties, in the absence of some term in the contract providing against such contingency, or of some statutory regulation of the subject, affect the validity of the marriage settlement: *Evans v. Carrington*, 2 De Gex, F. & J.

481; Barclay v. Waring, 58 Ga. 86; Babcock v. Smith, 22 Pick. 61; Child v. Pearl, 43 Vt. 224. Bonds for the payment of money have been enforced upon the executed consideration of marriage: Smith v. Patterson, Cheves Eq. 29; Ancker v. Levy, 3 Strob. Eq. 197; Logan v. Wienholt, 1 Clark & F. 611. The promise of a woman to marry a man was held a sufficient and valuable consideration to support his deed to her, where it appeared that she had been prevented from executing the promise without her fault, but by his death: Smith v. Allen, 5 Allen, 454, 81 Am. Dec. 758. The marriage contract (that is, the agreement to marry) is complete and executed when the parties to it have entered into the married relation in the manner required by statute. Undoubtedly every valid marriage contemplates that the parties shall live together as husband and wife "till death them do part." In a case like the present one the agreement to live together as husband and wife could include nothing more on this point than the original vows of matrimony did. To say that marriage was not an execution of that part of a marriage settlement between a ⁹⁷² man and a woman, competent to marry, as would require the performance of the other undertakings in the settlement, would be to practically destroy that which for time out of mind has been regarded as a subject of such contracts, for it would necessarily postpone the execution of the remaining part of such contracts till the death of one of the parties; thereby substantially destroying their value, in many instances, to the party benefited, and intended to be protected by them. We must hold, in reason and under the authorities, that this feature of the contract under consideration was executed by the resumption of the parties of the marital relation and duties. What relief appellee would be entitled to, as to a restoration of the property, or some part thereof, if Mrs. Moayon should subsequently abandon him without cause, is a question we do not determine.

4. Does the contract sufficiently describe the property to be conveyed? The description in the contract is: "One-third of all his [appellee's] estate, real, personal, or mixed, of whatever kind and nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him." Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property concerning

which a contract is made, to identify it. As said in *Warvelle on Vendors*, volume 1, section 96: "While an unequivocal description, giving location, area and boundaries, is a literal and perfect observation of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts ⁹⁷³ or other instruments by means of which the land can be ascertained with sufficient certainty." The ideal, perfect description is preferred. But we cannot compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing them when lawful and practicable. It is not necessary, then, that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract, or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: "All the other estate otherwise acquired or owned by me." In *Warvelle on Vendors*, section 135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me." The following descriptions have been held sufficient: "My lot on the plat in the town of S., on the plat of said town, on the river bank" (*Colenck v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505); the "Snow farm" (*Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536); "H.'s place at S." (*Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87); the "Knapp home property" (*Goodenow v. Curtis*, 18 Mich. 298); an agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson*, 85 Ala. 53, 3 South. 758; *Towle v. Carmelo Land etc. Co.*, 99 Cal. 397, 33 Pac. 1126; *Doctor v. Hellberg*, 65 Wis. 415, 27 N. W. 176.) In all such cases parol evidence was admitted not to identify, but to designate ⁹⁷⁴ the subject matter, already identified in the minds of the parties, in the language of the contract when read in the light of the facts. In this state, in *Overstreet v. Rice*, 4 Bush, 3, 96 Am. Dec. 279, the expression, "We have swapped farms," naming the terms, but without further description of either farm, was held sufficient, after the parties had themselves identified the lands intended to be affected, by taking

possession of them. In *Ellis v. Deadman*, 4 Bibb, 466, the writing was: "4 January, 1808. Received of Jesse Ellis \$—, in part pay for a lot he bought of me in the town of Versailles; it being the cash part of the purchase of said lot. Nathan Deadman." This court said: "Had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution." It is as essential that the terms be specified as the description of the property. "Ten acres adjoining him on the north," in a bond for title to land of the vendor adjoining the vendee was held sufficient in *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114. In *Henderson v. Perkins*, 94 Ky. 211, 14 Ky. Law Rep. 782, 21 S. W. 1035, the description was, "my home place and storehouse." It was held sufficient, on the authority of *Ellis v. Deadman*, 4 Bibb, 466, and *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114. In the case of *Varnum v. State*, 78 Ala. 28, the description was: "My entire crop of every description, raised by me, or caused to be raised by me, annually till this debt is paid." While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was, by the statutes of frauds, required to be in writing. Concerning that description that court said: "It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be ~~etc~~ included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification." Parol evidence cannot be introduced to vary, enlarge or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, "That is certain which can be made certain." In this case it has been said, "all" means all. "All of my land" is a description, by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete and admits of no possibility of mistake in this case. Applying

to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract.

5. It is true that, by the common law, contracts between husband and wife were void. Yet equity recognized numerous instances in which the parties had peculiar property rights which they were allowed to personally control, and to make contract concerning. It would be an anomaly and a reproach to the law to say that it recognizes a legal property right in one, to whom all the doors of every ⁸⁷⁶ court were closed. Therefore it was early held (Story's Equity Jurisprudence, 1372) that, although contracts between husband and wife are void at law, they are not always so in equity. This court has repeatedly affirmed the same doctrine. In *Evans v. Evans*, 93 Ky. 510, 14 Ky. Law Rep. 628, 20 S. W. 605, it was said: "Generally, if a contract between husband and wife merely be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity." This case was followed in *Bohannon v. Travis*, 94 Ky. 59, 14 Ky. Law Rep. 912, 21 S. W. 354. In *Ward v. Crotty*, 4 Met. (Ky.) 59, it was affirmed that the husband's contract with the wife would be specifically enforced against him in equity, without the intervention of a trustee. This has been adhered to in *Maraman v. Maraman*, 4 Met. (Ky.) 89, and *Campbell v. Galbreath*, 12 Bush, 459. It is further re-enforced by legislative enactment looking to the same end, viz., section 34 of the Civil Code, as follows: "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property, in actions for personal suffering or of injury to her person and character, in which he refuses to unite, she may sue or be sued alone." The wife may maintain her action.

It follows that the judgment must be reversed, and the cause is remanded for further proceedings not inconsistent herewith.

An Agreement not to bring a well-founded suit for a divorce is both a legal and a sufficient consideration: *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452, 45 N. E. 737, 36 L. R. A. 771. A promissory note, executed by a husband for the benefit of his wife, in consideration of her discontinuing an action for a divorce, and returning to live with him, is valid: *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675. Compare *Copeland v. Boaz*, 9 Baxt. 223, 40 Am. Rep. 89; and see *Merrill v. Peaslee*, 146 Mass. 460, 4 Am. St. Rep. 334, 16 N. E. 271.

ILLINOIS CENTRAL RAILWAY CO. v. MATTHEWS.

[114 Ky. 973, 72 S. W. 302.]

CARRIERS—Liability for Baggage.—Under a statute providing that every carrier shall check every parcel of baggage taken by it for transportation, it is liable only for what the passenger takes with him for his own personal use and convenience. (p. 318.)

CARRIERS—Merchandise as Baggage.—If a carrier accepts a package or trunk of merchandise for transportation as baggage, with knowledge of its contents, it is liable therefor as for baggage. (p. 319.)

CARRIERS.—Paying Overweight Charges on Trunks as Baggage is not of itself such notice to the carrier that the trunks contain merchandise, or articles other than ordinary baggage, as to render the carrier liable as for baggage. (p. 320.)

CARRIERS—Loss of Baggage—Ownership.—If a passenger is not the owner of goods checked by him as baggage, but is liable to the real owner for loss or damage to them, he is entitled to be treated as their owner for the purpose of an action against the carrier for their loss or damage while in its hands. (p. 320.)

Pirtle & Trabur and J. M. Dickinson, for the appellant.

J. W. Bennett, for the appellees.

975 O'REAR, J. Appellee was a traveling salesman or drummer for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allowed as free baggage to one passenger, and appellee was required and did pay sixty cents extra as overweight charges. The trunk contained about seventeen hundred dollars' worth of dental goods—steel instruments, presumably. These goods were used not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers, if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession, it got wet and the instruments were damaged by rust, it is claimed, to the extent of about **976** five hundred dollars. There was evidence for appellee that when the trunk was being loaded on the train, the person handling it (whether a porter, roustabout, or baggage-master, or whether connected with the railroad, he did not know) remarked as to its extraordinary weight, and that appellee replied that it con-

tained dental instruments. For appellant, its baggage-master at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof. On this state of case the court gave the jury the following instructions: "No. 1. The court instructs the jury that if they believe from the evidence of defendant, while the plaintiff's trunks were in custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein sustained by reason of such injury, not exceeding the sum set out therefor in the petition. No. 2. If the jury believe from the evidence the plaintiff's trunk, while in the custody and care of the defendant, was burst or torn in handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition." Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as ⁹⁷⁷ baggage on the passenger-cars by defendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find." From a verdict and judgment in favor of appellee for five hundred and thirty-one dollars and fifty cents' damages, this appeal is prosecuted.

The first instruction given to the jury assumes as a matter of law that the common carrier is accountable, under its liability as carrier, for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this state on the subject of baggage is that found in section 783 of Kentucky Statutes, as follows: "Every company

shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop, or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same." We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and ⁹⁷⁸ which he has committed to the care of the carrier. Generally, the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but they may include a number of other articles, which may not unreasonably be designed for his pleasure, business or convenience upon the journey which he is prosecuting. "In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience and comfort, according to the habits and wants of the class to which they belong": *Oakes v. Northern Pac. R. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230, 12 L. R. A. 318. Story on Bailments, section 499, thus states it: "By 'baggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like": *Bomar v. Maxwell*, 9 Humph. 624, 51 Am. Dec. 682; *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612. Rorer on Railroads, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term 'baggage.' This depends much on the condition, habits and circumstances of life of the passenger. Ordinarily, it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; . . . but not money in larger amount than for necessary expenses, nor articles of merchandise, or of virtu." As, ordinarily,

only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the ^{or} baggage, and may reasonably be presumed to have regulated his charges and provided means for its safekeeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels, not properly classed as baggage, or plate, or merchandise, bonds, or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which, by common prudence, would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident of the passenger's contract for passage. The common-law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may, of course, vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage, with knowledge of its contents: *Hutchinson on Carriers*, 1st ed., sec. 685; *Texas etc. R. R. Co. v. Capps*, 2 Wills. Civ. Cas. Ct. App., sec. 33; *Jacobs v. Tutt* (C. C.), 33 Fed. 412; *Central Trust Co. of New York v. Wabash etc. Ry. Co.* (C. C.), 39 Fed. 417; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. ²⁵⁰ Ct. Rep. 711, 37 L. ed. 587. The fact that the passenger paid for the extra weight of the trunk does not vary the rule; for, if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not notice that the package contains anything besides the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally

well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage: *Haines v. Chicago etc. Ry. Co.*, 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248. If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract: *Story on Bailments*, 9th ed., sec. 565. In the event of loss of or damage to such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in a case of a bailee without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent charged with the duty of receiving and checking baggage over its lines knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger; that is, knew that they contained merchandise or other articles than the traveler's wearing apparel: *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Brown v. Camden etc. Ry. Co.*, 83 Pa. St. 316.

While it is true that a carrier cannot be made liable for the goods of another than the passenger or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee, he had such an interest in them, by reason of his being responsible to them for their loss or damage and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger. We therefore conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

The Liability of Carriers for the Baggage of passengers is the subject of a monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 343. Whether merchandise can be included under baggage is discussed at pages 354-357 of this note, where the principal case will be found cited. The principal case is also cited at page 388 of this note, to the point that it is not necessary that a passenger be the owner of baggage carried by him to entitle him to recover for its loss, but it is sufficient if he is liable to the owner therefor: Compare page 348.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

SQUIRE & CO. v. TELLIER.

[185 Mass. 18, 69 N. E. 512.]

CONSTITUTIONAL LAW—Sales in Bulk.—A statute providing that a sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular prosecution of the seller's business shall be fraudulent and void as against all creditors, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller under oath to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list of the proposed sale and of the price included and the conditions thereof, but exempting from its provisions sales by administrators, executors, receivers, assignees for the benefit of creditors, trustees in bankruptcy and public officers acting under judicial process, is a constitutional exercise of the police power of the state. (p. 324.)

Bill in equity to reach a certain stock of merchandise and to apply it to the satisfaction of a debt due to the plaintiff from the defendants Tellier and Chausse, who had sold such merchandise to the defendant Hudon. This sale had been made without complying with the statutes of 1903, referred to in the opinion, and was void as against creditors of the seller, if that statute was constitutional. A demurrer was interposed by the defendant Hudon. It was overruled by the trial court, which,

at the request of the parties, reported the case to the supreme court for its determination.

M. S. Holbrook, for the plaintiff.

A. W. Putnam and H. A. Richardson, for the defendant Hudon.

A. E. Pillsbury and W. M. Morgan, for the Boston Credit Men's Association.

¹⁸ KNOWLTON, C. J. The only question for our consideration on the demurrer to this bill is whether the Statutes of 1903, chapter 415, is ¹⁹ constitutional. The first section of this statute is as follows: "The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms and conditions thereof." The second section exempts from the provisions of the act, sales by executors, administrators, receivers, assignees for the benefit of creditors, trustees in bankruptcy and public officers acting under judicial process. This is a pretty stringent regulation of a certain class of sales. The purpose of the legislature evidently was to provide for creditors protection against a class of sales which are frequently fraudulent, and which leave creditors with no means of collecting that which they ought to receive. The statute deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business. It does not interfere with the transaction of ordinary business, but relates to unusual and

extraordinary transfers. In substance, it declares that a sale of this kind shall not be made without first giving to creditors an opportunity to collect their debts, so far as the property to be sold might enable them to collect, or subsequently making satisfactory provision for the payment of these debts. A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be ²⁰ safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pay his debts. The legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property, and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on meane process, and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it.

The legislature undoubtedly assumed to act under what is termed broadly the police power, and more specifically to act under the authority directly conferred by chapter 1, section 1, article 4 of the constitution of Massachusetts, which permits them "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth," etc. Their power to regulate and limit the making of contracts and the use and disposition of property is very broad. This is illustrated by the statutes found in titles 12 and 13 of our Revised Laws, comprising chapters from 56 to 74, inclusive. This power is recognized in many decisions of the courts: *Commonwealth v. Blackington*, 24 Pick. 352; *Blair v. Forehand*, 100 Mass. 136, 139, 97 Am. Dec. 82, 1 Am. Rep. 94; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694;

Commonwealth v. Crowell, 156 Mass. 215, 30 N. E. 1015; Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Commonwealth v. Gilbert, 160 Mass. 157, 160, 35 N. E. 454, 22 L. R. A. 539; Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; Newton v. Joyce, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; Commonwealth v. Nutting, 175 Mass. 154, 78 Am. St. Rep. 483, 55 N. E. 895; Slaughter-House cases, 16 Wall. 36, 21 L. ed. 394; Butchers' Union Co. v. Crescent ²¹ City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585; Frisbie v. United States, 157 U. S. 160, 165, 15 Sup. Ct. Rep. 586, 39 L. ed. 657; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223; Nutting v. Massachusetts, 183 U. S. 553, 22 Sup. Ct. Rep. 238, 46 L. ed. 324.

Although the requirements of the act are very strict, we cannot say that the determination of the legislature, as between the interests of owners of stocks of merchandise and their creditors, was so far wrong as to render the statute unconstitutional. Within certain limitations, it is for the legislature to judge of the policy and expediency of a law, if, in other respects, they have power to enact it: Bancroft v. Cambridge, 126 Mass. 438, 441; Sawyer v. Davis, 136 Mass. 239, 241, 49 Am. Rep. 27; Opinion of the Justices, 163 Mass. 589, 595, 40 N. E. 713, 28 L. R. A. 344; Commonwealth v. Pear, 183 Mass. 242, 248, 66 N. E. 719; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385.

The statute is not objectionable as applying only to a particular class. It applies to all who come within the reasons for its enactment: Commonwealth v. Danziger, 176 Mass. 290, and cases cited, 57 N. E. 461; Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81.

Similar statutes having the same object but varying considerably in their provisions, have been enacted recently in many other states. In Tennessee and in Washington the highest court of the state has decided that the statute there enacted is constitutional: Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947. The statute in Washington is very similar to that now before us. See, also, Hart v. Roney, 93 Md. 432, 49 Atl. 661, and Fisher v. Herrman, 118 Wis. 424, 95 N. W. 392, in which the courts of Maryland and Wisconsin seem to assume the constitutionality

of their local statutes on this subject, which are somewhat less restrictive than that of Massachusetts.

Demurrer overruled.

The Principal Case is cited, with other cases on the constitutionality of statutes regulating the sale of goods in bulk, in the note to *Black v. Schwartz*, 101 Am. St. Rep. 987.

SMITH v. AETNA LIFE INSURANCE COMPANY.

[185 Mass. 74, 69 N. E. 1059.]

INSURANCE AGAINST ACCIDENT.—It is a Voluntary Exposure to Unnecessary Danger to engage in riding a steeplechase. (p. 327.)

INSURANCE AGAINST ACCIDENT.—The Knowledge by an Agent of the Insurer, before issuing a policy, that the insured occasionally rode steeplechase races does not prevent the insurer from avoiding the policy, on the ground that the insured was injured while riding in a steeplechase, and that such riding was a voluntary exposure to unnecessary danger. (p. 328.)

T. H. Gage, Jr., for the plaintiff.

H. H. Fuller, for the defendant.

⁷⁴ **MORTON, J.** This is an action to recover indemnity under an accident insurance policy for injuries received by the plaintiff while engaged in riding a steeplechase. The case was heard by a judge of the superior court upon agreed facts, and the judge found and entered judgment for the defendant and the plaintiff appealed.

The policy in suit is a renewal policy and expired June 6, 1901. The accident occurred June 1, 1901. The original policy was issued in 1895, and ran for one year. There were successive renewals from year to year as each expired. In the application on which the original policy was issued the plaintiff's ⁷⁵ occupation was stated to be that of a cotton manufacturer. The application required that the "occupations" of the applicant "should be fully stated." In the policy the plaintiff was described as "a cotton manufacturer by occupation." Amongst the conditions on which the policy was issued was one that the policy should not cover injuries caused by "voluntary exposure to unnecessary danger." On May 28, 1901, the defendant learned that the plaintiff engaged in steeplechase riding,

and directed its agent in Worcester to cancel the plaintiff's policy on the ground that it could not assume that hazard or take the chance of a claim. Thereupon the defendant's agent sent a check for the unearned premium to the agents through whom the plaintiff had procured the policy and to whom he had paid the premiums, with a request to notify the plaintiff that the policy had been canceled and to return it. The plaintiff was absent from the city, and his bookkeeper opened the letter containing the notice and check, and after communicating with the agents through whom the plaintiff had obtained the policy, and being assured by them that it would be all right to do so, delivered up the policy. There was a provision in the policy giving the defendant the right to cancel it upon returning the unearned premium. Upon being informed as to what had taken place in his absence the plaintiff repudiated what had been done, and notified the defendant that he held the check subject to their order.

There are two questions before us: 1. Whether the plaintiff's injuries were received in consequence of a voluntary exposure to an unnecessary danger within the meaning of the policy; and 2. Whether the policy had been duly canceled before the accident.

We do not find it necessary to consider whether the policy had been duly canceled, as we are of opinion that there was a voluntary exposure to unnecessary danger. Steeplechase riding, as commonly understood, differs from ordinary riding and driving and involves elements of unusual hazard and danger. There can be no question that the danger was unnecessary and that the exposure to it was voluntary. There was nothing in the description of the occupation of the plaintiff contained in the policy nor in anything else contained in the policy which included steeplechase riding or which showed that the plaintiff engaged ⁷⁶ in it. We do not mean to say that an accident policy containing a provision like that contained in the policy in this case against voluntary exposure to unnecessary danger debars the insured from recovery if injured while engaged in the common sports and amusements. But in steeplechase riding, the liability to accident is much greater than in the ordinary sports and amusements. The fact that the race in which the plaintiff was injured was for amateurs makes no difference. Neither does the circumstance that the defendant's agent was aware that the plaintiff occasionally rode steeplechase races make any difference. The liability of the defendant depends

on the terms of the policy and whether an accident sustained in steeplechase riding comes within them. For reasons already given we do not think that it does.

Judgment affirmed.

The Words "Voluntary Exposure to unnecessary danger," when employed in an insurance contract, relate to dangers of a substantial character which the insured recognizes and to which he nevertheless consciously and purposely exposes himself, intending at the time to assume the risk of the danger: *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, and see the cases cited in the cross-reference note thereto.

DELORY v. BLODGETT.

[185 Mass. 126, 69 N. E. 1078.]

MASTER AND SERVANT—Fellow-servants, Employés of Different Persons, When are.—If a master lends or hires his servant to another to do work for the latter and under his direction, such servant becomes a fellow-servant with the servants of the person to whom he is thus lent or hired, and cannot recover of their master if injured through their negligence. The test is whether, in the particular service which he is engaged to perform, he continues liable to the control and direction of his master, or becomes subject to that of the party to whom he is lent or hired. (pp. 329, 330.)

MASTER AND SERVANT—Employment of Incompetent Servants, When not Established.—Testimony that an engineer had been known to drink intoxicating liquor does not tend to prove that his employers were negligent in employing him. (pp. 330, 331.)

Tort to recover for personal injuries claimed to be due to the negligence of the defendants' engineer. The trial court directed a verdict for the defendants, and the plaintiff alleged exceptions.

W. A. Buie and W. J. Miller, for the plaintiff.

E. P. Carver and F. H. Smith, Jr., for the defendants.

¹²⁶ KNOWLTON, C. J. The plaintiff, while repairing machinery in the defendants' shop, was injured through the negligence of ¹²⁷ one Whippen, the defendants' engineer, in starting the machinery. The plaintiff rests his claim for damages on two propositions: 1. That he was not a servant of the defendants, and therefore that Whippen was not his fellow-servant; and 2. That if Whippen was his fellow-servant, the defendants were negligent in employing him because he was an unfit person to be trusted with the management of an engine.

The plaintiff's relations to the defendants appear from his testimony as follows: He said he was a millwright and carpenter in the general employment of the American Tool and Machine Company as a jobber; that jobbers were sent to do any kind of work, and were supposed to go wherever they were sent, and work until the work was done; that he and another man were directed by telephone to go to the defendants' place; that he had been there two or three times before; "that what he was sent to do first was to tighten up a pulley"; that afterward, while he was in the engine-room washing his hands, the defendants' superintendent, Alden, came down and said to him, "Hurry upstairs; there is something wrong with the belt"; that he went upstairs with the superintendent, and started to work and adjusted the tightener; that when he got through that, the superintendent said to him, "Come over and see if the wire is leading in the center of the sheave"; that when he first came upstairs it was at the request of Alden, the superintendent; that when he went up to go to work on the tightener, Alden went with him; that after he got through with the tightener he asked Alden if there was anything else to do, and that Alden called his attention to the rope that ran over the sheave. The plaintiff's undisputed evidence shows that he was an expert workman, lent to the defendants by his general employer to make repairs upon their machinery. It appears that the American Tool and Machinery Company were accustomed to render bills to the defendants for labor and materials furnished, the labor being charged and paid for at a price per hour.

The law in regard to persons working in this way has often been considered by this court. In *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759, Mr. Justice Barker quoted as a true statement of the principle, this language from Cockburn, C. J., in *Rourke v. White Moss Colliery Co.*, 2 C. P. 205, 209: "But when one person lends ¹²⁸ his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." In *Coughlan v. Cambridge*, 166 Mass. 268, 277, 44 N. E. 218, 219, Mr. Justice Morton says: "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." In *Ward v. New*

England Fibre Co., 154 Mass. 419, 28 N. E. 299, it was held that on the question whether work was done by the general master of the servant under a contract which gave him the right to control the business as it was going on, and to complete it without any right of interference or control by the person for whom it was being done, the fact that the payment was to be made at the usual prices for labor and materials, instead of by giving a round sum, was not conclusive. The mode of payment in such a case is usually very significant, but it is possible for a proprietor to contract for the performance of certain work on his property in a way which will give the contractor a legal right to furnish the whole work, and to direct all details, without interference by the proprietor, and to receive at the end a price to be determined by the current rates for labor and materials. In such a case, if the proprietor should prevent the performance of the contract by the contractor, he would be liable in damages; and so long as the work was going on, the workmen would be servants of the contractor, under his direction and control. This fact was also referred to in *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; but in each of the cases the true principle was recognized, as stated by Mr. Justice Lathrop in the latter case, as follows: "There is no doubt but that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow-servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." It makes no difference whether the proprietor to whom a servant is lent actually exercises his right of control and direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill ¹²⁰ for the result. This was decided in *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. As was said in *Samuelian v. American Tool etc. Co.*, 168 Mass. 12, 46 N. E. 98: "The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their machinery."

The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it.

If he has done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant.

The rule applied when one furnishes for hire or lends to another a team of horses with a driver is simply an application of this principle. The circumstances are often such, that while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that, as to the particulars of the management of the horses, he is the servant of his general employer, in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver a right of control. This is the ground of the decisions in *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58, and *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922. In the present case the plaintiff's testimony shows that he was not only legally subject to the direction and control of the defendants, but that the control was exercised by the defendants' superintendent by a series of directions. The plaintiff was a servant of the defendants, and a fellow-servant of Whippen, the engineer.

There was no evidence that the defendants were negligent in employing an unfit or incompetent servant. There was testimony from two witnesses that at some times Whippen had been known to drink intoxicating liquor, but there was no evidence ¹³⁰ that he was ever intoxicated, or that the defendants had knowledge that he drank intoxicating liquor, much less that he drank to excess. The testimony of other witnesses indicated that he was not in the habit of drinking liquor. The jury would not have been warranted in finding the defendants negligent in employing him.

Exceptions overruled.

If an Employé is Lent by his employer to another person, and is injured by the negligence of an employé of the latter, he is regarded, according to *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, as being injured by a fellow-servant.

BJORNQUIST v. BOSTON AND ALBANY RAILROAD COMPANY.

[185 Mass. 180, 70 N. E. 53.]

RAILWAYS.—To a Trespasser on Its Cars a railroad company owes no duty except to refrain from willfully or wantonly and recklessly exposing him to danger. This rule is not rendered inapplicable by the doing of something directed to the trespasser and intended to affect immediately his conduct or condition, if the thing done is in the exercise of the legal rights of the railway company. (p. 334.)

RAILWAYS.—A Railway Corporation may Exercise Force Toward a Trespasser on Its Cars, if the force is limited to that which is reasonable under the circumstances, and is kept within the legal rights of the railway company. (p. 334.)

RAILWAYS.—Duty Toward Trespasser of Brakeman in Charge of Train.—If a brakeman is in charge of cars, it is his duty to do all that he reasonably can to keep trespassers away from them. He may, from the necessity of the case, appeal to them in some form, and in some degree to fear as a motive to induce obedience to proper rules. (p. 335.)

RAILWAYS, Liability of, for Injuries Due to Threat of Brakeman.—If a brakeman, finding boys stealing a ride on the cars of his employer, says to them, "Get out of there, or I will break your neck," and one of the boys thereupon jumps, and, in jumping, slips and falls under the wheels, and is injured, what the brakeman did and said does not constitute such reckless and wanton negligence as to render his employer answerable to the boy thus injured, though he was only eight and a quarter years of age. (p. 337.)

Tort to recover for personal injuries to the plaintiff. The trial judge refused to direct a verdict for the defendant and submitted to the jury four special issues, which, with the answers to them, were as follows:

"1. Was the plaintiff, at the time the brakeman spoke and moved toward him, in a position of safety? He was.

"2. Was the car, at the time that the brakeman spoke to the plaintiff, moving at such a rate of speed as to make it dangerous for the plaintiff to get off? It was moving at a dangerous rate of speed for the plaintiff.

"3. Did the plaintiff use due care in attempting to get off the car in obedience to the command of the brakeman? He did use all the care he was capable of at the time.

"4. Did the plaintiff attempt to leave the car because of fear of injury from the brakeman, or because he knew he was a trespasser and wanted to escape the consequences of his own act of trespass? He left on account of fear of injury from the brakeman."

Verdict for the plaintiff of twenty-one thousand dollars, and the defendant alleged exceptions.

S. Hoar and G. P. Furber, for the defendant.

S. A. Fuller and W. E. Bowden, for the plaintiff.

¹³¹ KNOWLTON, C. J. The defendant was moving two or three oil-tank cars on a short sidetrack used for loading and unloading freight, close by its freight-yard in Cambridge. The switching engine was behind the cars without being coupled to them, and the cars were pushed or "kicked" a short distance on the tracks, and left to stop from their own inertia. These were platform-cars, constructed with a large tank extending longitudinally between points about two feet from the ends of the car, and with stakes set at intervals along the sides of the car at the edge of the floor, with an iron rod passing through the top of the stakes, leaving room to pass between the tank and the rod on each side. The plaintiff, a boy of ordinary intelligence, about eight and a quarter years of age at the time of the accident, was a trespasser on the forward one of these cars, lying on his stomach with his feet and legs hanging over the side of the car. At that point there was an iron step on the side of the car, and he had climbed up, taking hold of the stake, and was riding as the car was pushed by the engine. The floor of the car was about as high from the ground as his shoulders when he was standing, or as he testified, about as high as the crutch which he used at the time of the trial. One Perry, a companion, three years older than he, had got up on the opposite side of the car with his feet on the step, which was an iron strap or loop attached underneath to the side of the car, and was riding, ¹³² holding on to the upright stake which was near the end of the car. One of the defendant's servants, who is described as a brakeman, had uncoupled the engine from the car next it, and was riding on the car, when he saw one or both of these boys near the forward end of the forward car, and called out in a loud tone, "Get off there or I will break your neck." The boys immediately started to jump off, and the plaintiff fell so that his feet came upon the track and he was seriously injured. His language in testifying was: "When I was going to jump I slipped. . . . There was a step right there; I put my foot in that and I was going to jump and I slipped and went under the wheels."

The defendant's servant was acting in the management of the cars just before the accident, and it does not appear that any other person was employed at that time in the control of them. On this evidence the jury might well find that it was within the scope of his employment to try to keep trespassers away from them. To the plaintiff as a trespasser the defendant owed no duty, except to refrain from willfully or wantonly and recklessly exposing him to danger. This is the uniformly recognized rule in regard to the management of a proprietor's business and the performance of his ordinary duties. A question may be raised whether the rule is the same if the proprietor does anything which is directed to the trespasser and is intended to affect immediately his conduct or condition. We are of opinion that in ordinary cases this makes no difference, if the action is in the exercise of the legal rights of the proprietor, and in other respects is in the proper performance of his duties. When this action takes the form of the intentional use of force upon the person of a trespasser, the force must be limited to that which is reasonable under the circumstances, in the exercise of his legal rights. Any excess may be punished as an assault and battery. This is because force upon the person of another is ordinarily harmful and injurious. One who uses it must guard his conduct so as not to go beyond his legal rights. So, if an action is brought for reckless and wanton negligence in dealing with a trespasser, and if the conduct relied on is the intentional use of force upon the person in an attempt to exercise one's legal rights, it may well be that because of the ¹³³injurious nature of the agency employed, wantonness and recklessness would ordinarily be inferred from any excess of intentional force beyond that which was reasonably necessary. But this principle is not applicable to a use of language which is intended to have no further effect than to influence the voluntary action of another. In the latter case the question is not whether the use of the language is entirely reasonable and proper, but whether it is so unreasonable or improper in reference to its probable effect upon the safety of the person to whom it is addressed, as to indicate a wanton and reckless disregard of probable dangerous consequences.

In the present case all that the brakeman did which is relied on as reckless and wanton negligence was to call out as above stated, and to walk forward in an ordinary way. According to the testimony of two of the plaintiff's witnesses, he was not on

the car on which the plaintiff was, but on the one behind it. According to the testimony of the plaintiff he was at the rear end of the car on which the plaintiff was, and from there was walking forward.

If we assume that he was in charge of the cars, it was his duty to do all that he reasonably could to keep trespassers away from them. It was his duty, not only in reference to the interests of his employer, but in reference to the interests of the trespassers themselves. The dangers to trespassers about moving cars, especially in freight-yards, are great and constant. The persons with whom the employé has to deal, whether vagrants trying to steal rides upon freight trains or boys seeking amusement upon moving cars in freight-yards, are almost always of a bold and lawless kind. Sober reasoning, friendly advice and gentle admonition, after the intruders have accomplished their purpose, would in most cases be entirely ineffectual to prevent or diminish trespassing by such persons. From the necessity of the case, appeal must be made in some form and to some degree to fear as a motive to induce obedience to proper rules. It is necessary and proper, in a reasonable way, to interfere with the enjoyment of boys taking rides in such places, rather than to permit them to complete their rides pleasantly.

The evidence is that the plaintiff lived only three hundred or four hundred yards from the place of the accident, and that ¹²⁴ between his home and the railroad were open fields where the boys were accustomed to play ball and other games. He testified that just before the accident he was returning from fishing, and had stopped with two other boys to play tag on the platform of one of the buildings of the oil works at which cars were unloaded, and that as he saw the two tank cars and the engine he called to Perry, his companion, "Come on, let's take a ride," and that they then ran and got upon the car farthest from the engine. It is hardly to be supposed that boys living so near and accustomed to play close by moving cars were ignorant of orders of their parents or others which forbade them to get upon the freight-cars which were being switched back and forth in or near the yard. It is reasonable to infer that in dealing with such boys, quite as much for their own safety as for the interests of the railroad company, some show of severity would be needed on the part of the defendant's employés. These conditions are important in considering the conduct of the defendant's servant.

He gave a single command, accompanied with a threat, which no intelligent boy would interpret literally, but which implied a severe reproof, and a possibility of punishment if disobedience was repeated and persisted in. Except the use of this expression, which apparently was instantaneous and perhaps almost involuntary, there was nothing said or done by him to which exception could be taken. Is this evidence of a wanton and reckless disregard for the personal safety of the boys?

The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. Sometimes it has been called gross negligence and sometimes willful negligence. Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term "willful negligence" is not a strictly accurate description of the wrong. But wanton and reckless negligence in this class of cases includes something more than ordinary inadvertence. In its essence it is like a willful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences. This is a wrong of a much more heinous character than common ¹³⁵ inadvertence: See *Aiken v. Holyoke St. Ry. Co.*, 184 Mass. 269, 68 N. E. 238, and cases there cited.

In the present case there is no evidence to show when the brakeman first saw either of the boys, or whether he had seen more than one of them before he spoke. His language seems to refer to but one person. It is at least as probable that he was speaking to the larger boy, Perry, who was standing on the step on the right-hand side of the car, as to the plaintiff. Perry's position was far more prominent than that of the plaintiff who was lying on the floor of the car. The fact that the brakeman subsequently walked forward on the side where the plaintiff was is not significant, for upon all the testimony there was then nothing threatening in his attitude or manner. When he spoke the cars must have been going very slowly, for the testimony of both of the boys is that they started to jump off as soon as he spoke, and the cars moved only about fifty feet after the plaintiff fell. There was no evidence that the brakes were set at any time. Moreover, Perry testified that when he jumped off he passed around in front of the car and went away. If the cars, stopping of their own inertia, moved only fifty

feet after the accident, they had then come almost to a state of rest.

The question relates to the state of mind of the brakeman, which can be inferred only from the circumstances. If his language was addressed to the plaintiff, was there, from his point of view, such a probability that he would jump off before the car stopped, as to involve any danger of falling? If the plaintiff should start to jump off before the car stopped, was there such a probability that he would get under the wheels as to indicate wantonness and recklessness on the part of the brakeman? There was a stake and a strap or loop step attached to the side of the car just where the plaintiff was; besides, the side of the car projected out beyond the track, and if the plaintiff fell perpendicularly he would not be likely to fall upon the track. The brakeman had no reason to think that a boy riding upon a car in that way would fail to use such care as he was capable of in getting off, whether he started before the car stopped or afterward. The undisputed evidence shows that the plaintiff was not acting involuntarily, but was trying to jump from the step when his foot slipped.

¹³⁶ The right of a brakeman upon a train to perform his prescribed duties, even though performance involves something of peril to a trespasser, is stated in *Leonard v. Boston etc. R. R. Co.*, 170 Mass. 318, 49 N. E. 621. In *Planz v. Boston etc. R. R. Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, where the trespasser was injured in jumping from a moving freight train at the command of a brakeman, it was held that there could be no recovery. *Mugford v. Boston R. R. Co.*, 173 Mass. 10, 52 N. E. 1078, is very similar to the present case, and it was held that there was no evidence of negligence on the part of the defendant's servant. In that case the plaintiff was a boy a little older than the present plaintiff, but the cars seem to have been running considerably faster than these: See, also, *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446. In view of the duties which the defendant's servant had to perform, and the circumstances attending the accident, we discover no evidence that when he gave his command there was such an apparent probability that it would cause serious injury to the plaintiff as to indicate a wanton and reckless disregard for harmful consequences.

If he owed the plaintiff a duty to make provision for his safety, or to refrain from action which might in any degree

expose him to danger, the case would be very different. If the question were whether he exercised such care for the plaintiff's safety as would be deemed reasonable for one charged with a positive duty to look out for him and protect him, it might well be submitted to the jury. If the brakeman's command was given to the plaintiff, as distinguished from the larger boy in a different situation, it might well be found that he did not exercise a high degree of care for the plaintiff's safety. But such an omission falls short of recklessness which is equivalent to a willful wrong for which he would have been subject to criminal punishment if the accident had caused the plaintiff's death.

The burden of proof was upon the plaintiff to show this grave misconduct of the defendant's servant. While we feel that the case is not free from difficulty, we are of opinion that there was no evidence which tends to show that he was guilty of a wanton and reckless disregard for human life and personal safety.

Exceptions sustained.

The Case of Albert v. Boston Elevated Ry. Co., 185 Mass. 210, 70 N. E. 52, is an action of tort by a newsboy, twelve years of age, to recover for injuries suffered from falling or being thrown from an open electric-car of the defendant. The plaintiff jumped upon the running-board of an ordinary street-car as it was passing through a street, for the purpose of selling his papers. The car was going at about its usual rate of speed, which was not increased or diminished until after the accident. As he was changing hands and trying to get out a paper, he either fell off or intentionally jumped off. The testimony tended to show that the conductor standing on the rear platform made a motion or said something which the plaintiff did not understand, but which he thought was either "Get off" or "Get out of here," and the plaintiff, being frightened, jumped off. The court held that, as in the principal case, he was a trespasser to whom the defendant owed no duty except to refrain from willfully or recklessly and wantonly exposing him to injury, and hence there could be no recovery in his favor.

A *Railroad Company* ordinarily owes no duty toward trespassers on its trains further than to refrain from wantonly, willfully, or recklessly exposing them to danger: *Jordan v. Grand Rapids etc. Ry. Co.*, 162 Ind. 464, ante, p. 217, and cases cited in the cross-reference note thereto. But for willful, wanton, or reckless injuries to a trespasser the company is answerable (*McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437; *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266), as where its employé strikes him with missiles so as to cause him to fall from moving cars: *Pollatty v. Charleston etc. Ry. Co.*, 67 S. C. 591, 100 Am. St. Rep. 750; or where an employé, by threatening acts, frightens a trespassing child into jumping from a moving train: *Enright v. Pittsburg etc. R. R. Co.*, 198 Pa. St. 166, 82 Am. St. Rep. 795.

McLAUGHLIN v. RICE.

[185 Mass. 212, 70 N. E. 52.]

TENANCY BY ENTIRETIES, Extrinsic Evidence of.—When a conveyance is to a man and woman, extrinsic evidence is admissible to prove that they were husband and wife, and hence received the title as tenants by the entireties. (p. 340.)

TENANCY BY THE ENTIRETIES, When Created.—A deed to a man and woman vests title in them as tenants by the entireties, if they are husband and wife, though the grantees did not have any intent what technical estate should be conveyed to them. (p. 340.)

TENANCY BY THE ENTIRETIES.—On the Death of a Husband, when a deed to real property has been made to him and his wife during coverture, she becomes the sole owner of the property. (p. 340.)

Writ of entry by the heirs of Robert McLaughlin to recover the undivided one-half of a tract of land. The defendants claimed to own the property in severalty under a conveyance executed by McLaughlin's widow. The property, prior to May 2, 1878, belonged to Samuel Harris, who conveyed it to "Robert McLaughlin and Jane McLaughlin, and their heirs and assigns forever." Against the objections of the demandants, the defendants were permitted to prove that at the date of the execution of the conveyance to Robert and Jane McLaughlin they were husband and wife. The demandants asked the court to rule: 1. That evidence respecting the marriage was incompetent and inadmissible; 2. That there was not sufficient evidence that Robert and Jane McLaughlin were husband and wife; 3. That under the deed to them they took as tenants in common. The judge refused to so rule and found: 1. That Robert and Jane McLaughlin were husband and wife at the time of the conveyance to them; 2. That the intent and purpose of the parties to the conveyance was that the title to the premises should vest in Robert and Jane McLaughlin as husband and wife, but that the parties did not contemplate or have any intent what technical estate should be created thereby; 3. That Robert and Jane McLaughlin made no conveyance during their joint lives; 4. That he died in June, 1879, and she in November, 1899. Upon the facts as thus found, the judge ruled that Robert and Jane McLaughlin took an estate by the entireties, of which, at his death, she became the sole owner. Judgment for the defendants and demandants excepted.

H. J. Dubois, for the demandants.

H. M. Davis, for the defendants.

²¹³ LATHROP, J. 1. The first exception in this case and the first request for instructions raise the question whether, when land is conveyed by deed to A and B, evidence is admissible to show that the grantees are husband and wife. We have no doubt that such evidence is admissible. If it were not, then a deed from a husband directly to his wife, which did not describe her as such, would be a valid deed, which could not for a moment be contended. In *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938, a deed was ²¹⁴ made to A and B, the latter being described as the wife of A. It was held that as B was not in fact the wife of A, the grantees did not take an estate by entirety. It is the fact and not the description or want of description which determines the question. The first exception must therefore be overruled, and the first request for instructions was properly refused.

2. The second request for instructions was not argued.

3. The third request for instructions was also properly refused. The deed being to a man and his wife, they took an estate by entirety, and not as tenants in common. The deed was executed in 1878, and as the law then stood the rights of the grantees, they being husband and wife, were the same as at common law: Gen. Stats., c. 89, secs. 13, 14. See, also, Pub. Stats., c. 126, secs. 5, 6. It was not until the Statutes of 1885, chapter 237, section 1, that the law was changed. In construing all conveyances prior to that statute, it has been held that a conveyance to a husband and wife conveyed an estate by entirety: *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Donahue v. Hubbard*, 154 Mass. 537, 26 Am. St. Rep. 271, 28 N. E. 909, 14 L. R. A. 123; *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938; *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657.

The ruling of the court below that as the wife survived her husband she was the sole owner of the granted premises, and the finding for the tenant, were therefore right.

Exceptions overruled.

Tenancies by the Entirety are discussed in the monographic note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389. By the common law, such a tenancy is created when the grantees are husband and wife, unless a contrary intent is manifest: *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422; *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep.

102; *Stelz v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475; *Roulston v. Hall*, 66 Ark. 305, 74 Am. St. Rep. 97; *Appeal of Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94; *Johnson v. Johnson*, 173 Mo. 91, 96 Am. St. Rep. 486. But this rule has been abrogated in many states: *Robinson*, Appellant, 88 Me. 17, 51 Am. St. Rep. 367; *Kerner v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550, 84 N. W. 92; *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53. See, however, *Baker v. Stewart*, 40 Kan. 442, 10 Am. St. Rep. 213; note to *Rose v. Rose*, 84 Am. St. Rep. 442.

MARTELL v. WHITE.

[185 Mass. 255, 69 N. E. 1085.]

CONSPIRACY, When Unlawful.—The unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. (p. 343.)

TRADE, Restraint of—Unlawful Conspiracy to Prevent Competition.—An association of granite manufacturers which imposes upon any of its members a fine for dealing with a person not a member of the association, where the fine is so large as to amount to moral intimidation or coercion, acts for an unlawful purpose, and if its action results in injury to the trade or business of another, its members may be answerable to him in an action of tort for their wrongful conspiracy. (p. 349.)

Tort for conspiracy to injure the plaintiff in his business of quarrying any selling granite carried on at Quincy, Massachusetts. The trial judge ruled that the action could not be sustained on the evidence, and directed a verdict for the defendants. The plaintiff alleged exceptions.

E. R. Anderson, for the plaintiff.

J. W. McAnarney and J. E. Cotter, for the defendants.

255 HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute. The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined through the action of the defendants and their associates.

The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Massachusetts, and some of them were on the executive committee. The association was composed of "such individuals,

firms, or corporations as are, or are about to become, manufacturers, quarriers, or polishers of granite." There was no constitution and, while there were by-laws, still, except as hereinafter stated, ²⁵⁶ there was in them no statement of the objects for which the association was formed. The by-laws provided, among other things, for the admission, suspension and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying in part the expense of the maintenance of this organization, any member hereof having business transactions with any party or concern in Quincy or its vicinity not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least one dollar and not more than five hundred dollars. The amount to be fixed by the association upon its determining the amount and nature of said transaction."

Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and under the section above quoted it was voted that the offending parties should respectively "contribute to the funds of the association" the sums named in the votes. These sums ranged from ten dollars to one hundred dollars. Only the contribution of one hundred dollars has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed should they continue to trade with the plaintiff.

The jury might properly have found also that the euphemistic expression "shall . . . contribute" to the funds of the association contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions

recites that "there was no evidence of threats or intimidation ²⁵⁷ practiced upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against him alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts.

Here, then, is a clear and deliberate interference with the business of a person with the intention of causing damage to him and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this have they kept within lawful bounds?

It is elemental that the unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*, ²⁵⁸ 107 Mass. 555, 564, in the following language: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has

no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable: Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, 613; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339. The justification must be as broad as the act and must cover not only the motive and the purpose, or, in other words, the object sought, but also the means used.

The defendants contend that both as to object and means they are justified by the law applicable to business competition. In considering this defense it is to be remembered, as was said by Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, 611, that there is presented "an apparent conflict or antimony between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound and to be sustained within proper bounds, but each of which must finally yield to some extent to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through ²⁵⁹ which at least the line must run and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure upon the evidence. The association had no written constitution, and the

by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine; from which it may be inferred that it is the idea of the members that for the protection of their business it would be well to confine it to transactions among themselves, and that one at least of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employes and between this association and similar associations in the same line of business be kept and "lived up to." Whether this failure to set out fully in writing the objects is due to any reluctance to have them clearly appear, or to some other cause, is of course not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then so far as respects the end sought the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day ~~too~~ may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his own preference and that

of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the *Mogul Steamship* case, 23 Q. B. Div. 616: "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights": See, also, opinion of Stirling, L. J., in *Giblan v. National Amalgamated Laborers' Union* (1903), 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the *Mogul Steamship* case above cited, and in *Bowen v. Matheson*, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when ²⁶¹ the trader is allowed in his business to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J., in the *Mogul Steamship* case, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others, and so long as he keeps within the operation of the laws of trade his justification is complete.

But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done

by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentations, nor by intimidation, obstruction or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal: *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287.

Nor is the nature of the coercion changed by the fact that the persons fined are members of the association. The words of *Munson, J.*, in *Boutwell v. Marr*, 71 Vt. 1, 9, 76 Am. St. Rep. 746, 42 Atl. 607, 609, 43 L. R. A. 803, are applicable here: "The law cannot be compelled by any initial agreement ~~and~~ of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may be properly classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal instrument. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and in many it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature but conditional, and is inconsistent with the conditions upon which the right rests, then the coercion becomes unjustifiable and taints with illegality the act.

The defendants strongly rely upon *Bowen v. Matheson*, 14 Allen, 499, *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337, *Macauley Brothers v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L. R. A. 455, and *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686, 28 Atl. 19, 23 L. R. A. 135. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition, for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay ten per cent, but the propriety or the legality of that provision was not involved. In *Bowen v. Matheson*, 14 Allen, 499, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might

be done in many ways which are lawful and proper, and as no illegal methods are stated the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendant it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, Slaughter-house Cases, 16 Wall. 36, 116, 21 L. ed. 394; Addyston Pipe etc. Co. v. United States, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136; Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 43 L. R. A. 797; Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822, 48 L. R. A. 568; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Olive v. Van Patten, 7 Tex. App. 630, 25 S. W. 428; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 346, 37 N. E. 14, 23 L. R. A. 588; Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561; Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 547; Mogul Steamship Co. v. McGregor, 15 Q. B. Div. 476, 21 Q. B. Div. 544, 23 Q. B. Div. 598, [1892] App. Cas. 25.

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

Combinations Constituting Unlawful trusts and monopolies are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. Subsequent cases bearing upon the decision in the principal case are *Straus v. American Pub. Assn.*, 177 N. Y. 473, 101 Am. St. Rep. 819; *State v. Armour etc. Co.*, 173 Mo. 356, 96 Am. St. Rep. 515; *Ertz v. Produce Exchange Co.*, 82 Minn. 173, 83 Am. St. Rep. 419; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125. The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means: *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746.

CHICAGO TITLE AND TRUST COMPANY v. SMITH.

[185 Mass. 363, 70 N. E. 426.]

JUDGMENTS of a Court of a Sister State, Conflict of Laws as to Defenses to.—If a person is sued in Massachusetts upon a judgment pronounced against him in another state, his defenses are regulated by the laws of Massachusetts, and not by the laws of the state wherein the judgment was rendered. (p. 351.)

JUDGMENT of a Court of a Sister State, Defense of Want of Service of Process.—Though the defendant against whom an action is brought on a judgment rendered in another state was a resident thereof when the judgment was rendered, he may plead and prove that he was not served with process and did not authorize an appearance in the action in which the judgment was entered. (pp. 351, 352.)

PRACTICE.—A Part of the Answer of a Witness may be Excluded, on the ground that it is not responsive to the question asked him. (p. 352.)

Action of contract on a judgment of a superior court of Cook county, in the state of Illinois. The trial judge decided in favor of the defendant, and the plaintiff alleged exceptions. The deposition of George Sawyer, a lawyer of Chicago, was offered on behalf of the defendant. He was asked, "Was said F. De Witt Smith ever notified of the case of Steele v. The Chicago Paper Manufacturing Company, or served with any process in said case as far as you know?" He answered, "Yes, sir. He was so served, as he told me." The last four words of the answer were excluded, on the ground that they were not called for by the interrogatory, and the plaintiff excepted.

J. A. Wainright, for the plaintiff.

J. C. Hammond and H. P. Field, for the defendant.

364 BARKER, J. The plaintiff, as receiver of the Chicago Paper Manufacturing Company, an Illinois corporation, seeks to recover upon an alleged judgment rendered in the superior court of Cook county, Illinois, on July 3, 1901, in an action begun on October 3, 1890, in favor of the plaintiff as such receiver, whereby that court adjudged and decreed that the plaintiff as such receiver recover of and from the defendant the sum of seventeen thousand nine hundred and twenty-two dollars and nineteen cents, and that execution issue therefor against the defendant.

The present action was begun on November 11, 1901, and was heard by the court without a jury, with a finding for the

defendant on July 29, 1903. A memorandum of the presiding judge filed on the same date shows that he found that the Illinois judgment was invalid because the defendant was not served with process in the Illinois suit and that the appearance entered for him was not authorized or ratified by him, so that the Illinois court had no jurisdiction to enter judgment against him therein, although he then was a citizen of Illinois. Before ~~was~~ the judgment was entered the defendant had removed from Illinois, and when the judgment was entered he was a resident of New York.

The case is here upon exceptions to the introduction of evidence by the defendant tending to show that he never was served with process in the Illinois suit and never knew of or authorized any appearance for himself therein. There is also an exception to the striking out of a part of a reply of a witness to a question put to him in taking his deposition.

1. The principal contention of the plaintiff is that, because the defendant was a citizen of Illinois he can contest the validity of the judgment only by proceedings for its review in the courts of the state where it was rendered. The record contains no evidence of the law of Illinois, and it may well be that by that law the defendant, if sued in Illinois upon the judgment, could defend by showing that he had not been served with process and had not entered or authorized an appearance. But if we assume that by the law of Illinois a judgment debtor in a judgment obtained there has no remedy when sued there upon the judgment but by proceedings to review or annul the judgment, when the same judgment debtor is sued here upon the judgment his defenses here are not regulated by the law of Illinois but by the law of Massachusetts. When brought into our courts he has a right to have the same law administered which our courts give to our own citizens or to those of any other state.

When a judgment debtor is sued here upon a judgment the defenses open to him depend upon the fact as to where the judgment was entered. If in our own courts the defense of want of service and that he never appeared is not open, and usually can be availed of only by proceedings to revise or annul the judgment: *Hendrick v. Whittemore*, 105 Mass. 23; *McCormick v. Fiske*, 138 Mass. 379. The only exception, made after the adoption of the fourteenth article of the amendments of the constitution of the United States, is that a nonresident of Massachusetts against whom a judgment in personam has

been rendered here who neither was served personally with process nor appeared in the action in which the judgment was entered is not obliged when sued here upon the judgment to resort to a ³⁶⁶ writ of error to reverse it: *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. See *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705.

But when the judgment sued on here is not a domestic judgment, and is one rendered in another state or jurisdiction, the defendant may plead and prove that he was not duly served with process and did not authorize an appearance in the action in which the judgment was entered: *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149.

In *Finneran v. Leonard*, 7 Allen, 54, 83 Am. Dec. 665, the judgment was a domestic one, and in *Engstrom v. Sherburne*, 137 Mass. 153, the defendant appeared in the Nevada court.

The defendant in the present instance is within our rule which governs whenever foreign judgments are sued on in our courts and the evidence excepted to was admitted rightly.

2. The part of the answer of the witness excluded under the plaintiff's exception was not responsive to the question. For that reason it was excluded rightly.

Exceptions overruled.

A Judgment of a Court of a Sister State may be impeached for want of jurisdiction over the person or subject matter: *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447; *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389; *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794. If it is rendered without service of process and without appearance, it is invalid in another state: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872; *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181; *Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791.

As to the Effect of a Judgment of a Sister State obtained against nonresidents by publication, see *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125.

Whatever Pleas are good to a suit on a judgment in the state where it is rendered, it is said, can be pleaded in the courts of this state and no others: *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 46 Am. St. Rep. 335.

TABBUT v. AMERICAN INSURANCE COMPANY.

[185 Mass. 419, 70 N. E. 430.]

INSURANCE—Insurable Interest.—One Who Purchases Property Under a Conditional Sale, the title to remain in the vendor until full payment is made, has an insurable interest, but such interest is not that of an owner. (p. 354.)

CONDITIONAL SALE—Loss of Property, Who Must Bear.—If, on a conditional sale, by the terms of which payment is to be made in installments, and the title to remain in the vendor until payment is made, the property is destroyed by fire without the fault of the purchaser, he is no longer under obligation to make payment. The risk of the loss and destruction, where neither party is at fault, is upon a vendor who retains title. (p. 354.)

INSURANCE AGAINST FIRE—Nature of Contract.—A contract for insurance against fire in the form prescribed by the statutes of Massachusetts is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire. (p. 355.)

INSURANCE AGAINST FIRE—Measure of Indemnity.—Where the insured holds the property under a conditional sale, he cannot, on its destruction by fire, recover for the full value of the property, but only the sum which he has paid under the contract of sale, if it stipulates that the title shall remain in the vendor until full payment has been made, and there is nothing to show that the purchaser has suffered any damage other than the loss of his payments. (p. 355.)

D. C. Linscott and F. K. Linscott, for the plaintiff.

J. D. Bryant, for the defendant.

KNOWLTON, C. J. The plaintiff, having in her possession a piano which she held under a contract of conditional sale, obtained insurance on it in the sum of three hundred dollars by a policy in the Massachusetts standard form in the defendant company. The piano having been destroyed by fire, she brings this action to recover under the policy.

The contract under which she held the piano acknowledged her receipt of it "by way of conditional sale," and contained an agreement to pay five dollars at that time, and four dollars and fifty cents on the first day of each month thereafter, until the sum of two hundred and fifteen dollars, which was stated to be its value, should be paid in all, together with interest on all balances at the rate of six per cent per annum. She agreed that the instrument was to remain the property of the person from whom she received it until all of the payments should be made, and that it should not be removed from the house with-

out his written consent, and that, on her failure to perform the agreement according to its terms, he might take immediate possession of it and hold it free from all claims and demands. He signed an agreement that she might retain possession of it if she made the stipulated payments, and that he would give her a bill of sale of the instrument on her fulfillment of the agreement. At the time of the fire she had made four payments amounting to twenty dollars.

⁴²⁰ Although the title was not in her, it is conceded by the defendant that she had an insurable interest, and that the policy, which was in the common form, covered her interest whatever it might be: *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 379, 9 Am. Rep. 41; *Fowle v. Springfield Ins. Co.*, 122 Mass. 191, 194, 23 Am. Rep. 308; *Wainer v. Milford Ins. Co.*, 153 Mass. 335, 340, 26 N. E. 877, 11 L. R. A. 598; *Doyle v. American Ins. Co.*, 181 Mass. 139, 63 N. E. 394. But her interest was not that of ownership of the instrument, and destruction of the piano by fire would not deprive her of the general property in it. It has often been held in such cases that the risk of loss by destruction without the fault of either party is upon the person who retains the title. After the property had been burned, the plaintiff was not bound by her agreement to pay: *Thompson v. Gould*, 20 Pick. 134; *Weed v. Boston etc. Ice Co.*, 12 Allen, 377, 380; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Swallow v. Emery*, 111 Mass. 355; *Sloan v. McCarty*, 134 Mass. 245. From the nature of the agreement it is manifest that the parties contemplated, as a condition of performance by each, the continued existence of that to which the contract related: *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667, 12 L. R. A. 667.

The question in dispute is what sum the plaintiff is entitled to recover as damages. It is agreed that, if she is entitled to recover the full value of the piano, judgment is to be entered for two hundred and fifteen dollars and interest and costs. If her right to recover is limited to the amount she had paid at the time of the loss, with interest thereon, judgment is to be entered for twenty dollars, and interest and costs. The case was presented on facts agreed, with a statement that the plaintiff had no insurable interest in the property, "except as shown by, or as may be inferred from, the facts" agreed. The plaintiff appealed from a judgment in her favor for the smaller sum.

It is unnecessary to determine whether the interest of the plaintiff had any value in particulars not stated, as the burden was upon her to prove her damages. She had a possessory right, founded on a conditional sale, with the privileges pertaining to it which are given by the Revised Laws, chapter 198, sections 11-13. She had made payments amounting to twenty dollars, of which she was entitled to the benefit under her contract. No facts are stated which warrant the recovery of more than twenty dollars and interest, unless she was entitled to the full value of the property.

421 A contract for insurance against fire, in the form prescribed by our statute, is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire. His damages are not to be diminished because he has collateral contracts or relations with third persons which relieve him wholly or in part from the loss against which the insurance company agreed to indemnify him: *King v. State Ins. Co.*, 7 Cush. 1, 54 Am. Dec. 683; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Haley v. Manufacturers' Ins. Co.*, 120 Mass. 292, 297. This principle, as applied to mortgages in some of the cases cited, has now become unimportant in this commonwealth by reason of the provisions in the standard policy, requiring a mortgagee to assign his mortgage to the insurance company if requested: *Rev. Laws, c. 118, sec. 60*. As a general proposition it is applied broadly, but it has no effect to enlarge an insurable interest, the value of which fixes a limit to the amount to be paid under a policy in common form. In *Washington Mills Emery Mfg. Co. v. Weymouth etc. Ins. Co.*, 135 Mass. 503, 507, it was said that "the insurer cannot complain if he pays no more than the value of the property he has insured, no more than the sum insured upon it, and no more than the interest of the insured at the time of the loss." But this was said in reference to the effect of collateral contracts and conditions, and not in reference to an enlargement of the interest of the assured, for the protection of which the insurance was obtained. It has application in the present case, in the fact that the defendant cannot diminish its liability in this suit for the interest owned by the plaintiff at the time of the fire, on account of any right which the plaintiff now has under her contract with the vendor.

The plaintiff, in taking her insurance upon the property, became entitled to indemnity only to the extent of her interest:

Doyle v. American Ins. Co., 181 Mass. 139, 63 N. E. 394. Her interest was that of a holder of an executory contract to purchase the property at a given price, of which she had paid a part. That interest was lost by the fire, and for that loss she is entitled to be paid. We are of opinion that the ruling was right. Judgment affirmed.

As to the Insurable Interest of one holding property under a contract of sale, see *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686; *Hall v. Niagara etc. Ins. Co.*, 93 Mich. 184, 32 Am. St. Rep. 497; *Light v. Countrymen's Mut. Fire Ins. Co.*, 169 Pa. St. 310, 47 Am. St. Rep. 904. And as to the right to the proceeds of an insurance policy as between the vendor and the vendee of the property insured and destroyed, see *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rp. 855, and cases cited in the cross-reference note thereto; *Shadgett v. Phillips & Crew Co.*, 131 Ala. 478, 90 Am. St. Rep. 95; *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 92 Am. St. Rep. 809; *Phinizy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207; *Smith v. Phoenix Ins. Co.*, 91 Cal. 523, 25 Am. St. Rep. 101; note to *Reed v. Lukens*, 84 Am. Dec. 429-431.

OLDS v. CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY.

[185 Mass. 500, 70 N. E. 1022.]

ATTACHMENT, Bond to Dissolve—Estoppel to Deny Attachment.—If the defendant in an action as principal and a third party as a surety execute a bond in a pending action reciting an attachment, and that the principal desires to dissolve it according to law, and the condition of the bond is, that if the defendant shall, within thirty days after the final judgment in the action, pay to the plaintiff therein the amount of such judgment, the obligation of the bond shall be void, the surety is estopped, when sued, from contending that there was no attachment. (p. 359.)

ATTACHMENT, Bond to Dissolve—Collateral Securities.—When a bond is given to dissolve an attachment conditioned for the payment of any judgment which may be recovered in the action, the surety cannot require the obligee to exhaust any collateral securities which he may have held before taking judgment in the action in which the bond was given. If such surety has any interest or concern with the action of the obligee in such collateral, it can be no more than a right to subrogation on the payment of the bond. (pp. 359, 360.)

TRIAL—Finding of Facts, When not Necessarily Inferable.—Though a witness testifies that when certain notes matured, he was solvent and able to pay them, but afterward became insolvent and unable to pay them, it is not a conclusion of law that he was ever solvent or that any suit against him on the notes would have resulted in their payment. (p. 360.)

CORPORATIONS, Foreign, Statutes, When Inapplicable to.—The statutes of Massachusetts keeping corporations in existence for three years after the expiration of their charters, or whose corporate existence has been terminated in any other manner, do not apply to foreign corporations. (p. 361.)

CORPORATION, Foreign, Dissolution of—Jurisdiction of Court to Declare is not Presumed.—When a court, though of general jurisdiction, proceeds in matters relating to the dissolution of corporations only upon explicit legislative authority, it is not necessarily inferable from a statement of facts stating that the courts of another state entered a judgment declaring a corporation of such state dissolved, that such proceedings had been taken as gave the court jurisdiction to so declare. (pp. 361, 362.)

STATUTE of Another State—Presumption.—There is no presumption in Massachusetts that the statutes of New York give power to any court of the latter state to dissolve a corporation thereof. (p. 362.)

W. G. Bassett, for the defendant.

E. H. Hyde, of Connecticut, and J. B. O'Donnell, for the plaintiff.

⁵⁰⁰ **BARKER, J.** The plaintiffs, Olds and Whipple, on November 11, 1896, brought an action of contract in the superior court in Hampshire county against the Mapes-Reeve Construction Company, by a writ the ad damnum of which was ten thousand dollars and in which one De Witt Smith alleged therein to be a commorant of Northampton was named as trustee of the defendant with goods, ⁵⁹¹ effects and credits of the defendant in his hands to that amount. The alleged trustee answered that he was not a citizen or resident of Massachusetts, that he had no place of business therein, and that he had no goods, effects or credits of the defendant in his hands except that the construction company had brought an action against him seeking to establish a certain disputed claim and to establish a lien therefor upon certain real estate belonging to him in Northampton, submitting himself to examination and asking to be discharged and for his costs.

The construction company on January 11, 1897, entered a general appearance and filed an answer denying each and every material allegation in the writ and declaration. This being the situation of the case in court at the October sitting in 1898 the construction company filed a motion alleging that there was an attachment of its property on mesne process in the suit, by the summoning therein of the alleged trustee, to the amount of ten thousand dollars, and that the same was excessive, and asking for a reduction of the attachment. At the

same sitting, by consent and by order of the court, the attachment was reduced to four thousand five hundred dollars. Thereupon, on or about November 16, 1898, the construction company as principal and the City Trust, Safe Deposit and Surety Company of Philadelphia, the defendant in the present suit, as surety, gave to the plaintiffs a joint and several bond for the sum of four thousand five hundred dollars, reciting the attachment and stating that the construction company desired to dissolve it according to law. The present action is brought to recover from the surety upon this bond. One condition of the bond, among others not now material, is that if the construction company shall within thirty days after the final judgment in the action in which the attachment was made pay to the plaintiffs the amount if any which they shall recover in the action the obligation of the bond shall be void.

Thereafter the action was referred to an auditor and such other proceedings were had therein that on December 3, 1900, judgment for the plaintiffs was entered therein, by consent for four thousand three hundred and fifty-four dollars and thirteen cents damages and ninety-four dollars and thirty-three cents costs, and on this judgment execution issued on December 5, 1900. The construction company refusing to pay the judgment demand was made on the surety company to pay it or to satisfy the execution, and on March 1, ⁵⁰² 1901, this action was brought against it on the bond of November 16, 1898.

The action was heard upon an agreed statement of facts by the superior court sitting without a jury in June, 1903, and after a finding for the plaintiffs in the sum of five thousand one hundred and fifty-seven dollars' damages filed on August 10, 1903, the defendant appealed to this court, a judgment for the plaintiffs upon the finding having been entered in the superior court as of August 10, 1903.

1. The first contention of the defendant is that the bond was neither a good statutory bond nor a good common-law bond and that therefore it is invalid.

In support of this contention it is urged that there was no attachment, because the alleged trustee answered in such a way as to discharge himself. But his answer was not an absolute denial of funds. It in substance admitted that the construction company contended that he owed it a debt for which it was prosecuting a suit against him in which the company sought to establish a lien for its debt upon his land in Northampton. One of the agreed facts is that when the service was made on the

alleged trustee he was indebted to the construction company in a sum greater than the amount of the judgment which the plaintiffs recovered against that company, and that he paid the company his debt after the bond now in suit was filed. When the bond was offered it was still open to the plaintiffs to file interrogatories to the alleged trustee upon all matters stated in his answer, and if he had answered truly it would have appeared that when summoned as trustee he was largely indebted to the construction company. It cannot now be assumed that if compelled to answer interrogatories as an alleged trustee he would not have made statements upon which he would have been charged and the debt due from him to the construction company held and applied under the process to the extinguishment of the plaintiffs' demand. In consequence of the filing of the bond the alleged trustee was subjected to no further proceedings in the suit and the plaintiffs were left to rely wholly on the bond. The short answer to the contention that the bond is invalid is that it having been given under such circumstances it is not open to the defendant when sued upon to contend that there was no attachment. It was intended to induce the plaintiffs to abandon ⁵⁰³ their attempt to appropriate to the payment of their demand then in suit a debt owing by the alleged trustee to the construction company, and it did have that result, to the legal detriment of the plaintiffs. All the elements of an estoppel are present: See *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203.

2. The defendant contends that its position as one of the obligors of the bond was merely that of a guarantor of the solvency of the construction company and of one Reeve who when the bond was given was indorser on promissory notes given by that company to the plaintiff as collateral to the demand on which the suit was being prosecuted. But the contract entered into by the defendant was an explicit undertaking to pay the plaintiff four thousand five hundred dollars unless the construction company should pay a judgment within thirty days after it might be rendered. It would be absurd to hold that the surety on a bond given to dissolve an attachment could require the obligee to exhaust any collateral security which he might hold before taking judgment in the suit in which the bond was given. If, as we do not intimate, such an obligor has any concerns with the action of his obligee as to collateral, or as to other remedies which may be open to the obligee as against the defendant whose property is to be freed from

the attachment, it can be no more than a right to subrogation on payment of his bond, and in no event can it be more than an equitable defense to a suit upon his bond. The agreed facts show that the notes held as collateral were in existence and maturing when the bond was given, and that they never were renewed. While the agreed facts state that Reeve testified that when the notes matured he was solvent and able to pay them and that he thereafter became insolvent and unable to pay them, it is not a conclusion of law from that statement that he was ever solvent or that any suit against him on the notes would have brought in money to the plaintiffs. It is plain that the judge who heard the case on the agreed facts was not bound in law to find for the defendant because of the collateral notes or the plaintiffs' conduct with reference to them.

3. The remaining contention is that the judgment against the construction company was void because that corporation was dissolved before the judgment was entered. The corporation was one organized under the general laws of the state of New ⁵⁰⁴ York. Upon a petition of its directors for a voluntary dissolution an order was entered in the supreme court of New York on November 13, 1899, appointing a receiver, and another order making the appointment permanent and purporting to dissolve the corporation was entered on May 4, 1900. The only statement in the agreed facts as to the law of New York is that the court could have provided in its decree purporting to dissolve the corporation for the continuance in its name of suits then pending by and against it, and did not so provide. Neither of these orders was brought to the attention of the superior court and no proceedings were taken to enforce them here.

There seems to have been a studied attempt to keep the plaintiffs in this suit and the courts in which this suit was pending in ignorance of the dissolution proceedings. The original suit against the construction company was sent to an auditor who filed his report in favor of the plaintiffs in May, 1899. The New York decree purporting to dissolve the construction company was entered on May 4, 1900. The Massachusetts suit was tried by the court without a jury in June, 1900, and a finding filed in August, 1900. The plaintiffs took exceptions to the full court which were argued in September, 1900, a rescript was sent down October 18, 1900, and judgment was entered by agreement in December, 1900.

The attorney for the surety company in the present action was attorney for the construction company in the original action. One Kimber of New York, attorney, assisted in the defense of the construction company in the original action from beginning to end, and is assisting the surety company, in the same capacity in the present action. This same Kimber presented in November, 1899, the petition in the New York court for the dissolution of the construction company, and it was upon his motion that the dissolution was decreed on May 4, 1900. After this decree and without giving notice of it to the Massachusetts courts, this same Kimber allowed the Massachusetts attorney who had appeared for the defense up to that time to appear for the construction company and to try the case for it before the superior court in June, 1900, and then to argue the exceptions for the construction company in September, 1900, and then to agree to a judgment against the construction company in December, 1900.

505 The plaintiffs contend that the provisions of our statute relating to corporations whose charters have expired or whose corporate existence has been terminated in any other manner, originally enacted in statutes of 1819, chapter 43, and now found in Revised Laws, chapter 109, section 53, kept the construction company in existence as a body corporate in Massachusetts for three years from May 4, 1900.

Whether similar statutes should be held to apply to corporations created by any other sovereignty than that by which the statutes are enacted has been more or less discussed and with results which have varied in different jurisdictions: See *Fitts v. National Life Assn.*, 130 Ala. 413, 30 South. 374; *Marion Phosphate Co. v. Perry*, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252; *Stetson v. City Bank of New Orleans*, 2 Ohio St. 167, 12 Ohio St. 577; *Life Association of America v. Fassett*, 102 Ill. 315; *Rogers v. Adriatic Ins. Co.*, 148 N. Y. 34, 42 N. E. 515; *Hammond v. National Life Assn.*, 58 App. Div. 453, 69 N. Y. Supp. 585, 168 N. Y. 262, 61 N. E. 244.

We are of the opinion that our own statutes referred to were intended by the legislature to apply only to our own domestic corporations.

At the same time we are not ready to concede that after the dissolution of a foreign corporation by the sovereignty by which it was created, its creditors in this state cannot in some way by proceedings in equity or otherwise take advantage of the former

corporate life through our own courts so far as to avail themselves of assets in this state.

The present case was heard by the lower court upon agreed facts. Since it was agreed that a decree purporting to dissolve the construction company was entered in the supreme court of New York on May 4, 1900, the finding for the plaintiffs implies a finding that the decree of dissolution was void. The court which entered it was a court of general jurisdiction; but the dissolution of a corporation is a peculiar function which resides primarily in the legislature and is conferred upon courts only by explicit legislative authority: *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747. Therefore the decree of dissolution was void unless jurisdiction to enter it had been conferred upon the supreme court of New York by some statute law of that state. Therefore it was a question of fact for the lower court in the ⁵⁰⁶ present case whether jurisdiction to dissolve the construction company had been given to the New York court by a statute of that state.

The agreed statement of facts does not contain a clause that the court may draw inferences of fact from the facts and evidence stated, and therefore neither the inferior court in the first instance, nor this court upon the appeal had or has the right to found its judgment upon any disputable inference of fact: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536, 538; *Gallagher v. Hathaway Mfg. Co.*, 169 Mass. 578, 48 N. E. 844. Unless upon the facts stated "with the inevitable inferences, or, in other words, such inferences as the law draws from them," jurisdiction to dissolve the corporation appeared, neither the inferior court nor this court can infer such jurisdiction, nor find that the construction company was in fact dissolved. It is not an inevitable inference which the law draws conclusively from the entry of a judgment by a court of general jurisdiction that the court which entered it had jurisdiction of the cause, or to give all the relief which by its decree it purported to give. Nor is there any presumption in Massachusetts that the statutes of New York give power to any court of New York to dissolve a corporation: See *Kelley v. Kelley*, 161 Mass. 111, 112, 43 Am. St. Rep. 389, 36 N. E. 837, 25 L. R. A. 806. Therefore, the precise question is whether it was an inevitable inference from the agreed facts that the New York court had jurisdiction to decree a dissolution of the corporation on May 4, 1900, and then did make a decree not only purporting to dissolve the

construction company, but which in law and fact actually then extinguished totally its life.

In our opinion no such inevitable inference is drawn by the law from the facts stated, and therefore neither the lower court nor this court upon the appeal was precluded from finding that the judgment entered against the construction company after the date of the decree purporting to dissolve it was a valid judgment.

In an Action on an Attachment Bond the parties are estopped to question the regularity of the attachment: *Brown v. Tidrick*, 14 S. Dak. 249, 86 Am. St. Rep. 754. See, too, *Roswald v. Hobbie*, 85 Ala. 73, 7 Am. St. Rep. 23; *Jaynes v. Platt*, 47 Ohio St. 262, 21 Am. St. Rep. 810.

A *Surety* has no right to require the creditor to satisfy his demand out of the property of the principal before proceeding against him: *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 23 Am. St. Rep. 39; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156.

BRENNAN v. BRENNAN.

[185 Mass. 560, 71 N. E. 80.]

ESTATE upon Condition, When Created.—A will devising property to F. J. B., "provided that she shall take care of and look after me while I live," describes an estate upon condition precedent rather than an absolute estate. (p. 364.)

WILLS—Devise upon Condition Precedent, Absence of Knowledge of the Condition upon the Part of the Devisee.—If a testatrix devises all of her real property to one of her nephews, provided he takes care of her and looks after her while she lives, no estate vests in him if he does not comply with this condition, though he did not know of it until after her death. (p. 364.)

APPELLATE PROCEDURE, Stipulation as to the Judgment.—Where, on an appeal, the exceptions state that it was agreed that if the ruling of the trial court was right, judgment was to be entered on the verdict, and if wrong, to be entered for the demandants, the appellate court will, nevertheless, not enter judgment for the whole property in favor of the demandants, if, by the ruling of such court, the defendant is entitled to a moiety thereof. (p. 365.)

J. J. McCarthy and W. J. O'Donnell, for the demandants.

H. H. Winslow, H. J. Winslow and J. D. Hill, for the tenant.

see MORTON, J. This is a writ of entry to recover a certain parcel of land, with the buildings thereon, situated in Cambridge, to which the demandants claim title as heirs at law

of one Maria J. Day. The tenant is a brother of the demandants and is in possession and claims title to the premises as devisee under the will of Maria J. Day, which has been duly proved and allowed. The demandants and the tenant are nephews and nieces of the testatrix and her heirs at law. The sole question is whether the tenant took an estate in fee simple or upon condition. The superior court ruled that he took an estate in fee simple, and the case is here on exceptions by the demandants to this ruling.

The clause under which the tenant claims title is as follows: "Second. All the rest, residue and remainder of my property both real, personal and mixed, I give, devise and bequeath to Francis J. Brennan to him and his heirs forever, provided that he shall take care of me and look after me while I live." The clause is well drawn and aptly describes an estate upon condition. ⁵⁶¹ The word "provided" imports a conditional rather than an absolute estate (*Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692), and the nature of the devise, and the circumstances under which it was made, manifest, we think, an intention on the part of the testatrix to make a conditional rather than an absolute gift. Her object was to make provision for her own care and comfort during the remainder of her life. Except for this object there was no apparent reason for making the tenant the recipient of her bounty to the exclusion of his brothers and sisters. It is true that he had assisted her in making arrangements for admission to the hospital, and that he had taken a mortgage to enable her to raise funds for the contemplated expenses of her sickness at the hospital. But a niece had taken care of her from the beginning of her illness down to the time of her admission to the hospital and would seem to have had as much claim upon her bounty as the tenant. There is nothing to show that the testatrix and the tenant had been on terms of intimacy, or that she had at any time displayed any particular regard for him. If the circumstances would warrant an inference that she expected thenceforward that their relations would be more intimate than they had been, there is, nevertheless, nothing to show that she trusted to this expectation and the increased care for her comfort which might be expected to result from more intimate relations, as the sole ground of her bounty. The tenant relies upon *Colwell v. Alger*, 5 Gray, 67, *Martin v. Martin*, 131 Mass. 547, and *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379. But those cases are not applicable. In neither one of them was there, as here,

a condition in terms. In *Colwell v. Alger*, 5 Gray, 67, it is expressly said of the clause relied on that "whatever else it might have meant, it was not a condition. It was not a condition in terms." Neither were the circumstances such in either one of those cases as to show that a devise upon condition was intended, and that the language should be so construed. The condition would seem to be a condition precedent rather than subsequent. It related to something to be done during the lifetime of the testatrix before the estate could vest, and there is nothing to show that it was performed by the tenant.

The fact that the tenant had no knowledge of the provisions of the will until after the death of the testatrix is immaterial, ~~and~~ except so far as he takes as heir at law. In regard to this it is settled "that where the devisee, on whom a condition affecting real estate is imposed, is also the heir at law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof": *Jarman on Wills*, 6th ed., 853; *Kenrick v. Lord Beaucherk*, 11 East, 657, 667; *Taylor v. Crisp*, 8 Ad. & E. 779. It is true that in *Colwell v. Alger*, 5 Gray, 67, the court seems to lay down the proposition that a condition will not be valid which without notice requires of a beneficiary the performance of acts during the lifetime of the testator, such as providing for his support: See *Jarman on Wills*, 6th ed., 841, note 2, by Mr. Bigelow. But the proposition thus laid down is contrary to the weight of authority and was not necessary to the decision: *In re Hodges' Legacy*, L. R. 16 Eq. 92; *Astley v. Earl of Essex*, L. R. 18 Eq. 290; *Roundel v. Curren*, 2 Bro. C. C. 67; *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74; *Merrill v. Wisconsin Female College*, 74 Wis. 415, 43 N. W. 104.

The case is here on exceptions. But the exceptions conclude as follows: "It was agreed by the counsel of the parties, at the trial, that if the ruling of the court was right, judgment was to be entered on the verdict, and if wrong, judgment was to be entered for the demandants; damages for the rents and profits to be assessed at the rate of twenty-five dollars per month from the thirty-first day of July, 1901, or such judgment was to be entered as law and justice require." For reasons already given we think that the ruling was wrong. But since the tenant is an heir at law we do not see how an unqualified judgment for the demandants can be entered, as that would have the effect to deprive him of his interest as heir at law. But the exceptions conclude, as already observed, with the

stipulation that "such judgment was to be entered as law and justice require." It is stated in the exceptions that the demandants and the tenant are brothers and sisters and the next of kin of the testatrix. It is not stated that they are all of the next of kin, though that perhaps might be implied. Assuming that the demandants and the tenant are all of the next of kin, then the demandants would be entitled to ten undivided eleventh parts of the premises and of the rents and profits, and judgment should be entered accordingly. If it should appear that we are wrong in our assumption, application ⁵⁶³ can be made to the superior court for a new trial, or such other relief as may be appropriate.

Judgment for the demandants for ten undivided eleventh parts of the premises and of the rents and profits.

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IV. Consequence of Failure to Perform the Condition, 370.

I. Definition.

A condition precedent is one which must happen before the estate depending on it can vest or be enlarged: *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890; *Bogan v. Walker*, 1 Wis. 527; *Finlay v. King's Lessee*, 3 Pet. 346, 7 L. ed. 701. Hence, the execution of a deed or other grant or the coming into operation of a will in which a condition precedent is expressed does not of itself vest any title in the grantee or devisee, but it must remain in the original grantor or the heirs of the testator until the condition provided for occurs. Therefore, the great importance of devising a test or tests by which to determine whether a condition is precedent or subsequent, or, in other words, whether the title has vested, to be defeated or forfeited by the failure to perform the condition and the entry for condition broken, or whether, on the other hand, the title still remains with the grantor or testator or with the heirs or successors in interest of either.

II. Tests for Determining Whether a Condition is Precedent.

a. **Difficulty in Formulating Any Test.**—It is well-nigh, and perhaps quite, impossible to formulate any test by which to determine whether a condition is precedent or subsequent. It is admitted that there are no technical words which always determine this question, and that words appropriate to the creation of a condition subsequent are equally appropriate to the creation of a condition precedent: *Sheppard v. Thomas*, 26 Ark. 617; *Green v. Thomas*, 11 Me. 318; *Creswell v. Lawson*, 7 Gill & J. 227; *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 508, 36 Atl. 654, 35 L. R. A. 693; *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; *Jones v. Chesapeake etc. R. R. Co.*, 14 W. Va. 514; *Finlay v. King's Lessee*, 3 Pet. 346, 7 L. ed. 701.

b. **The Question is One of Intention** on the part of the grantor or deviser (*Markham v. Hufford*, 123 Mich. 55, 81 Am. St. Rep. 222, 82 N. W. 222, 48 L. R. A. 580), and such intention must be inferred from considering the deed or will as a whole, and probably any doubt which still exists may, in some instances, be resolved by considering the conditions and circumstances in which the writing was executed, and certainly where the existence of such condition and circumstances appears on the face of the writing. In the attempt to formulate some test, it has been said that if the thing to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent (*In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 508, 36 Atl. 654, 35 L. R. A. 693; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268), and that the resolving of the question depends upon ascertaining the order of time in which the acts are to be performed according to the intent of the testator or grantor as gathered from his grant or will: *Creswell v. Lawson*, 7 Gill & J. 227; *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462. These tests afford but little aid, because they, in substance, do no more than to affirm that the intent of the testator or grantor is controlling, but do not assist in determining what that intention was, or must be presumed to be from the language employed in it.

c. **Inserting the Condition Before the Granting Clause.**—Unless there are other words more persuasive and controlling, a writing first mentioning the condition and then saying that, when it happens, the property is granted or devised to the person named, seems to have been without exception construed to be a grant or devise on condition precedent. Thus, if a will or deed declares that if A shall do so and so, or shall acquire a specified easement, or shall remain in the testator's family until a time designated, or do some other act, then that there is granted, devised, or bequeathed to him, as the case may be, certain property, the condition is conceded to be precedent: *Nevius v. Gourley*, 95 Ill. 206; *Long v. Swindell*, 77 N. C.

176; *Tilley v. King*, 109 N. C. 461, 13 S. E. 936; *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597.

d. Where the Condition Must be Performed Before the Estate Vests, or It cannot be Performed at All.—In the principal case the condition expressed in the will was that the beneficiary should take care of and look out for the testator during his life. As the estate necessarily remained in the testator until his death, and as he could not be taken care of after that time, the condition could by no possibility be performed after such death, or after the estate had vested in the devisee, were it held possible for it so to vest. In such a case, the holding of the condition to be subsequent would be to dispense with it altogether. It must, therefore, be considered to be a condition precedent as must all other conditions which can by no possibility be performed until after the time arrives at which it is claimed the estate vests: *Den ex dem. Blean v. Messenger*, 33 N. J. L. 499; *Brennan v. Brennan*, 185 Mass. 560, ante, p. 363, 71 N. E. 80.

e. Where the Instrument Prescribes a Time When the Title is to Vest.—The intention of the testator or grantor may be declared in direct terms to the effect that the doing of some act must precede the vesting of the title. Thus, where a deed declared that, in consideration of a sum specified, the grantor conveyed to the grantee certain real property, but subsequently specified the balance of the purchase price remaining unpaid and the amounts which should be paid at certain subsequent dates, and then stated that when such payments were made, the instrument should take effect as a full and complete conveyance in fee, it was held to be a conveyance on condition precedent, and that the title remained in the grantor until full compliance with the conditions specified: *Mesick v. Sunderland*, 6 Cal. 297; *Brannan v. Mesick*, 10 Cal. 95. The same result must follow where the conveyance specifies that it is to take effect and become operative only upon the express condition that certain work shall be done, or a certain railway be constructed, within a time specified: *Tennessee etc. R. R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426. In a case like this the conveyance may be regarded as remaining in escrow, except that the condition on which it is to become operative is stated in the writing itself, instead of being incorporated in an extrinsic agreement.

f. Where the Performance of the Condition Constitutes the Consideration for the Grant or Devise.—If the execution of a grant or the making of a devise or bequest is without other consideration than the performance of the condition specified, then such consideration will ordinarily be held to be precedent, and the title will not vest until its performance: *Markham v. Hufford*, 123 Mich. 505, 81 Am. St. Rep. 222, 32 N. W. 222, 48 L. R. A. 580; *Tilley v. King*, 109 N. C. 461, 13 S. E. 936. Hence a devise to A on condition that his mother releases the testator's estate from a specified liability (*Howard v.*

Wheatley, 15 Lea, 607), or to B on condition that he assist the testator in certain pending litigation (*Cannon v. Apperson*, 14 Lea, 553), or a bequest to C of a sum to be paid him at the expiration of two years, provided he shall then be deemed a reformed man in the judgment of the executors (*Markham v. Hufford*, 123 Mich. 505, 81 Am. St. Rep. 222, 82 N. W. 222, 48 L. R. A. 580), is upon condition precedent. In some instances, as in the conveyance of real property expressed to be on condition of the payment of the balance of the purchase price, the instrument may be considered as in the nature of a mortgage or as an attempt to reserve and give notice of a vendor's lien, and hence as operating as a conveyance from the moment of its execution: *Sheppard v. Thomas*, 26 Ark. 617; *Creswell v. Lawson*, 7 Gill & J. 227. A like result follows where the condition is for the doing of certain acts after the instrument becomes operative, as where the testator makes a devise conditional on the support of certain persons after his death: *Woods v. Woods*, 44 N. C. (Busb. L.) 290; *Whithead v. Thompson*, 79 N. C. 450; *Misenheimer v. Sifford*, 94 N. C. 592.

g. **Where to Hold the Condition to be Precedent Must Render the Instrument Unlawful or Wholly Inoperative.**—Though the language of a testator in his will is such as of itself to manifestly create a condition precedent, it will, nevertheless, be held to create a condition subsequent where to hold otherwise will be to create a forbidden perpetuity, and thus frustrate the intention declared by the testator in his will: *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308, 36 Atl. 354, 35 L. R. A. 693.

h. **The Want of Any Limitation Over in a will or grant, while it may doubtless be entitled to weight where the intention of the testator or grantor otherwise remains doubtful, does not prevent appropriate language from being regarded as imposing a condition precedent, nor relieve the party from complying with the condition if he desires the title to vest in him:** *Tilley v. King*, 109 N. C. 461, 13 S. E. 956.

III. Doubts are Resolved Against the Condition.

The courts do not favor conditions, whether precedent or subsequent. As between conditions subsequent and a covenant, they incline in favor of the latter (note to *Ecroyd v. Coggeshall*, 79 Am. St. Rep. 750), and as between conditions subsequent and precedent, in favor of the former: *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308, 36 Atl. 354, 35 L. R. A. 693.

IV. Consequence of Failure to Perform the Condition.

The definition of a condition precedent given at the commencement of this note necessarily implies that until the condition is performed, no estate can vest. Furthermore, there must be a strict performance. It is not sufficient that the condition was partly per-

formed, or, if there are several, that all but one were performed. There must be a strict performance of all the conditions (*Nevius v. Gourley*, 95 Ill. 206), nor can anything, unless it be some act or waiver on the part of the person entitled to insist on performance, excuse nonperformance, or vest an estate before compliance with the condition. Hence, the want of knowledge of the condition or the impossibility of performing it constitutes no exception to the general rule: *Brennan v. Brennan*, 185 Mass. 50, ante, p. 363; *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 833, 30 S. E. 462. A different rule, it is said, applies to a legacy where the performance of the condition becomes impossible before the time of performance arrives, unless it appears that the performance was the sole motive of making the bequest: Note to *Burdis v. Burdis*, 70 Am. Rep. 834; *Nunnery v. Carter*, 5 Jones Eq. 370, 78 Am. Dec. 231; *Lefler v. Rowland*, 62 N. C. (Phill. Eq.) 144; *Culin's Appeal*, 20 Pa. St. 243. If, however, the party imposing the condition afterward makes performance impossible or unnecessary, he must be regarded as waiving it, and the instrument in which it is expressed must therefore be regarded as vesting title free of the condition: *Young v. Hunter*, 6 N. Y. 203; *Jones v. Chesapeake etc. R. R. Co.*, 14 W. Va. 514.

INHABITANTS OF HUDSON v. MILES.

[185 Mass. 582, 71 N. E. 63.]

PRINCIPAL AND SURETY—Knowledge by Obligee of Bond of Past Irregularities of Principal.—If it is known to the obligee in a bond that the principal has in the past been guilty of irregularities in respect of the duties for the faithful performance of which in the future the bond is given, the failure of the obligee to disclose that act is a defense to the liability of the surety. (p. 373.)

PRINCIPAL AND SURETY—Knowledge of the Obligee, When not Sufficient to Release the Surety.—Knowledge on the part of an obligee in the bond of a collector of taxes which does not arise upon hearsay or rumors, and "that there was a woman mixed up in the case," is not sufficient to release the sureties on the bond, though not communicated to them by such obligee. (p. 373.)

OFFICIAL BOND—Liability for Moneys Previously Received. Where a bond given by a collector of taxes is for the faithful discharge of his duties for his whole term, his sureties are liable for moneys previously received during that term, but before the bond was executed. (p. 374.)

OFFICIAL BOND, When Good as a Common-law Obligation.—Though a tax collector has given a bond, which has been approved by the selectmen, and their power to accept and approve bonds for that year is exhausted, yet a bond subsequently given by such collector may be good as a common-law bond. (p. 374.)

OFFICIAL BONDS—Statements Made to Sureties, but not Communicated to Oblige.—Statements made by a tax collector to induce persons to become sureties on his official bond, are not available in defense of such sureties when the statements were made without the knowledge of the obligee. (p. 375.)

OFFICIAL BONDS.—Negligence on the Part of the Selectmen and Other Officers of a Town in failing to make an investigation which would have discovered the misconduct of a tax collector and their failure to insist on his keeping certain books does not constitute any defense to his sureties. (p. 375.)

OFFICIAL BONDS, Liability of Sureties for Moneys Used to Pay Defalcations of a Previous Term.—If a collector of taxes who holds office for two terms, with different sureties on his official bonds, applies sums received for taxes during his second term to the payment of taxes due during the first term, which had been collected by him and not paid over, the sureties on his bond for the second term are liable, if the sums so paid were received in good faith by the town. (p. 376.)

R. E. Joslin and S. W. Mendum, for the plaintiff.

L. C. Southard, for the defendants.

⁵⁸⁸ **LORING, J.** This is an action on a bond dated July 1, 1899, given by a collector and twenty sureties. The bond recites that the defendant Miles has been elected collector of taxes of the plaintiff town for the current year, has accepted and been duly sworn, and is conditioned that he "shall, as collector of taxes as aforesaid, faithfully collect, account for and pay over all moneys which he shall be legally required to collect as collector of taxes as aforesaid and shall faithfully discharge all the other duties of said office during the time he shall hold said office under said election." The case came on for trial before a jury. Under the direction of the presiding judge a verdict was entered for the plaintiff. The case is here on a report which provides that if the rulings made at the trial were right, judgment is to be entered on the verdict and execution is to issue for \$9,800.10, with interest from August 24, 1901, with costs.

We are of opinion that the rulings made at the trial were right.

It appeared in evidence that the defendant Miles, the principal named in the bond now in suit, was elected collector of taxes for the years from 1893 to 1900, inclusive. Before 1896 he had given bond with individual sureties, and in 1897 and 1898 a surety company went surety for him on his bond. After Miles' election in March, 1899, he was asked by the selectmen to furnish his bond. They learned in that connection that

he intended to furnish a surety company as surety, but that he had difficulty in procuring one to go on his bond. In July the assessors were ready to commit their warrant to the collector. On July 18th Miles gave a bond with the defendant Apsley and the defendant Blake as sureties. This was given in pursuance of a letter written by Apsley in which he stated that Miles was expecting to give a bond with a surety company as surety, that there was a delay in procuring the surety company, and that he would be liable until such a bond was given. The bond given July 18th in pursuance of this letter was in the same form as the bond sued on. This bond was approved by the selectmen on July 18th, and the warrant for the taxes was forthwith committed to Miles by the assessors. After this bond was given Miles procured the defendants other than himself to sign a paper agreeing to sign his bond as collector "if twenty names are secured." ⁵⁹⁴ Twenty names were secured, and the bond sued on was executed by the twenty as sureties and was approved by the selectmen September 22, 1899. Miles, together with the defendants Apsley and Blake, understood when they executed the bond on July 18th that as soon as possible a bond with a surety company as surety was to be procured and "filed in place of" the one executed by them and approved by the selectmen on July 18th, and that bond, by vote of the selectmen on February 6, 1900, was delivered to the defendant Apsley.

In January, 1901, it was learned by officials of the town that the defendant Miles had been guilty of wrongdoing, and he was arrested on January 28th of that year.

All money collected and paid over by Miles while collector for 1899 was deposited by him in a bank to the credit of the treasurer of the town. When he deposited money he made a deposit slip in duplicate; one was returned to him after being verified by the cashier of the bank and the other was retained by the bank. The bank made a memorandum of the amount but not of the items of the deposit, and sent it to the town treasurer. On the deposit slip was stated the year to which the deposit was to be applied, and the names of the drawers of the checks deposited. Miles' method was to withhold money or checks collected by him, and to cover deficits so created with money collected upon the levy of a later year. His failure to turn over money collected extended throughout the whole period from 1894, and the total of his deficits increased steadily.

It was shown that before July, 1899, the chairman of the selectmen called on the officers of the surety company which

had gone surety on Miles' bond for the years 1897 and 1898, and "informally reported to the other selectmen and the defendant Apsley what he was told as their reasons for declining further to act as surety, or to become surety." The defendants then offered to show "that the surety companies stated to Mr. Tower, the chairman, that they had investigated Mr. Miles' character and habits, that there was a woman mixed up in the case, and on account of his bad reputation they refused to go on his bond, giving ostensibly that they did not wish to go on collectors' bonds, but the real reason was as given to Mr. Tower." The first exception is to the exclusion of this evidence.

⁵⁸⁵ To make this admissible the defendants must make out that this information which came to the selectmen by its being "informally reported" to them by the chairman, and information coming to persons whose knowledge is the knowledge of the plaintiff town (see *Lee v. Munroe*, 7 Cranch, 366, 3 L. ed. 373; *Hawkins v. United States*, 96 U. S. 689, 691, 24 L. ed. 607), and information which came to them in such a way that the town was chargeable with it, as to which see *Sooy v. State*, 41 N. J. L. 394, 400.

However these questions would be decided, we have found no case which goes so far as we are asked to go in the case at bar. It may be taken to be settled that if it is known to the obligee of a bond that the principal in the past has been guilty of irregularities in respect to the duties for the faithful performance of which in the future the bond is given, a failure of such an obligee to disclose that fact is a defense to the liability of the surety: *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sooy v. State*, 39 N. J. L. 135. The ground of this defense in some cases has been stated to be that fraud is made out (*Lee v. Jones*, 17 Com. B., N. S., 482, 507), and in other cases that there is a concealment of facts which the surety has a right to know: *Railton v. Mathews*, 10 Clark & F. 934, 943. But whichever is the ground of the defense, it does not extend in our opinion to a case where the information which has come to the obligee of a bond of a collector of taxes is no more definite than "that there was a woman mixed up in the case," and especially when the information which has come to the obligee does not rise higher than hearsay or rumors, as to which see *State v. Atherton*, 40 Mo. 209, 215, 217.

Evidence that \$421.67 of the sum found due to the plaintiff was collected between July 18th and September 22d was

rightly excluded. The bond is in terms given for the faithful discharge by the collector of his duties for the whole term. In such a case the sureties are liable for sums received during the term in question, although received before the bond was given: *Hatch v. Attleborough*, 97 Mass. 533. See *McIntire v. Linehan*, 178 Mass. 263, 59 N. E. 767.

The third exception is to the refusal of the presiding judge to rule "that the power of the selectmen to accept and approve a bond of the collector for the year 1899 was exhausted" by the approval of bond with the defendants Apsley and Blake as sureties, ⁵⁹⁸ and "that the bond sued upon was invalid and inoperative and to direct a verdict for said defendants." The defendants Apsley and Blake did not join in the request for this ruling. It is true, as the defendants contend, that until the bond of the collector was approved by the selectmen under Revised Laws, chapter 25, section 77, the tax list and warrant could not be transmitted to the collector (Rev. Laws, c. 12, sec. 67), but it does not follow that after that had been done a bond could not be given at common law. We are of opinion that the bond was good as a common-law bond. See in this connection, *Smith v. Crooker*, 5 Mass. 538; *Wendell v. Fleming*, 8 Gray, 613; *Sooy v. State*, 41 N. J. L. 394; *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; *Morrell v. Sylvester*, 1 Greenl. (Me.) 248.

An argument has been made by the defendants that the bond is without consideration. But that point was not taken at the trial, and is not open here. In disposing of the argument on this ground we do not mean to intimate that there would have been anything in the point had it been taken, as to which see *Page v. Trufant*, 2 Mass. 159, 3 Am. Dec. 41; *Mather v. Corliss*, 103 Mass. 568, 571; *Comstock v. Son*, 154 Mass. 389, 28 N. E. 296; *Krell v. Codman*, 154 Mass. 454, 26 Am. St. Rep. 260, 28 N. E. 578, 14 L. R. A. 860; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445; *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 415; *Sooy v. State*, 41 N. J. L. 394, affirming *Sooy v. State*, 38 N. J. L. 324.

The next exception is to the exclusion of evidence offered by the defendants Keith, Hall, Knight and Jennison, as to what was said by Miles when he asked them to agree to execute the bond as one of the twenty sureties. The defendants Keith and Jennison each offered to show that he was told that the bond he signed was to take the place of a temporary bond, while in

fact the bond executed by Blake and Apsley was not a temporary bond. Hall offered to show that Miles told him that he had no bond and it was necessary for him to have one. Knight offered to show that Miles said that he had to have a personal bond because the surety companies had given up going as surety on bonds of collectors. The defendant Trow offered to show that Miles told him nothing about the first bond executed by Apsley and Blake, and Hall and Knight offered to show that they were ignorant of the existence of that bond.

No evidence was offered connecting these statements with the ~~set~~ plaintiff or to show that they ever were brought to the knowledge of the plaintiff or of the selectmen. The obligee's right to hold the surety does not depend on representations made by the principal on his own behalf without knowledge of the obligee.

This bond was executed and delivered, and it is immaterial whether it was intended by the principal as an additional bond or as a substitute for the former bond, or was given in ignorance of the fact that there was another bond or whether some of the twenty-one defendants had one of these three intentions and some another. The delivery of the bond was absolute and was not made conditional on any one of these things. This exception must be overruled.

"Evidence was offered tending to show negligence on the part of the auditors, selectmen and treasurer of the town, since 1894, when Miles' peculations began, to January, 1901, when they were discovered, in failing to make investigations which would have disclosed his misconduct and insisting on his keeping certain books they furnished." Apart from the question whether the neglect of the auditors, selectmen or treasurer is the neglect of the plaintiff (see *Winthrop v. Soule*, 175 Mass. 400, 56 N. E. 575), their neglect is not a defense if it is the neglect of the plaintiff: *Amherst Bank v. Root*, 2 Met. 522; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Winthrop v. Soule*, 175 Mass. 400, 56 N. E. 575; *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440, 52 L. R. A. 782.

It appeared that the amount collected by Miles was \$65,813.86; the amount "deposited to the credit of the town or paid to the treasurer as collected upon his warrant for 1899 was \$56,366.28," a difference of \$9,447.58; in addition he failed

to collect \$352.52, making the sum of \$9,800.10, for which by the terms of the report execution is to issue if the rulings made at the trial were right. Of the \$9,447.58 Miles "received \$2,754.77 in checks, which he deposited as received but did not credit them to taxpayers from whom he received them upon his list for 1899." The defendants "claimed that inasmuch as the plaintiff actually received these sums, they were entitled to credit for them in reduction of the balance found due the plaintiff by the auditor." It appeared that the "total amount deposited to the credit of the plaintiff by Miles upon all his tax lists during the period between July 18, 1899, and January 28, 1901, the date of his ~~588~~ arrest, was \$73,654.27." This ruling was refused and an exception taken.

It was decided in *Colerain v. Bell*, 9 Met. 499, that, where a collector of taxes who held the office for two terms with different sureties on his official bond applied sums received from taxes during the second term to the payment of taxes due during the first term which had been collected by him and had not been paid to the town, the sureties on the bond for the second term were liable if the sums paid were received in good faith by the town. That case was followed in *Sandwich v. Fish*, 2 Gray, 298, and *Egremont v. Benjamin*, 125 Mass. 15. See, also, *Sooy v. State*, 41 N. J. L. 394, on appeal from *State v. Sooy*, 39 N. J. L. 539, in which *Egremont v. Benjamin*, 125 Mass. 15, is cited and followed. That is decisive of this exception. It was stated in argument by counsel for the plaintiff that the checks for \$2,754.77 were used to make good deficits caused by a failure to pay taxes collected during the year in question. Whether that is so or not does not appear from the report of the presiding judge. If we assume in favor of the defendants that it was not, the point is concluded by the authorities cited above.

The trial of this case is anomalous in that the court has undertaken to dispose at one sitting of the two questions which ordinarily are taken up separately—namely, whether there has been a breach of the bond, and, when that has been established, for what amount execution is to issue under Revised Laws, chapter 177, section 9, 10.

The entry must be judgment on the verdict. Execution to issue for \$9,800.10, with interest from August 24, 1901, and costs.

On the Duty of the Oblige in the bond of a public officer to warn the sureties of the principal's dishonesty, see *Milford v. Morris*, 91 Iowa, 198, 51 Am. St. Rep. 338; *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 80 Am. St. Rep. 271.

That the Negligence or Wrong of Other Officers is an inducement to the undertaking of sureties on the bond of a public officer is no defense to their liability: See the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 206.

An Irregularity in the Approval and acceptance of the bond of a public officer will not ordinarily prevent it from becoming obligatory as a common-law obligation: See the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 190, 191.

The Sureties on an Official Bond are ordinarily liable only for moneys received by their principal after its approval: *Grand Haven v. United States Fidelity etc. Co.*, 128 Mich. 106, 92 Am. St. Rep. 446. The bond may, however, be retrospective in operation so as to cover defalcations occurring within the term, but prior to its execution: *McMullen v. Winfield Bldg. etc. Assn.*, 64 Kan. 298, 91 Am. St. Rep. 236.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

KAVANAUGH MANUFACTURING COMPANY v. ROSEN.

[132 Mich. 44, 92 N. W. 788.]

SALES on Credit—Report of Commercial Agency.—A purchaser of goods on credit cannot be compelled to anticipate payments simply because the seller has received unsatisfactory reports from a commercial agency as to the financial standing of the purchaser. (p. 381.)

SALES on Credit—Breach of Contract.—A seller who, after receiving an order for goods to be sold on credit, ships part of them to the purchaser, but refuses to send him the remainder, because of receiving an unfavorable report of his financial standing from a commercial agency, is liable in damages for breach of contract. (p. 381.)

SALES.—Measure of Damages for Failure to Deliver Goods Sold is the additional cost of the goods if they can be obtained in the open market, but if not thus obtainable, the purchaser is entitled to recover the profits lost through the fault of the seller. (p. 381.)

Anderson & Rackham, for the appellants.

I. A. Lieghley, for the appellee.

⁴⁵ **MONTGOMERY, J.** On the 8th of February, 1899, the plaintiff's agent called upon defendants, A. D. Rosen & Co., at Detroit, and defendants gave an order to plaintiff for six hundred dozen of Gem underwear, assorted sizes, for the price of seventy-five cents per dozen for size 16, with a rise of twenty-five cents per dozen for each larger size, and a trade discount of fifteen per cent; same to be shipped June 1st on the following terms: Net 10, October 31st. This order was forwarded to the plaintiff and entered upon its books at the home fac-

tory, in Cohoes, New York. Two shipments were made, aggregating one hundred and seventy-four dozen, and this action is brought to recover the purchase price of these goods shipped. The case originated in justice's court, and the defendants gave notice of recoupment, and claimed damages for a breach of contract on the part of plaintiff, for failure to deliver the balance of the goods. On the trial at the circuit, plaintiff recovered the full value of the merchandise shipped, and defendants were defeated of any recoupment.

It will be noted that, upon the face of the contract, it appeared that payment was not due until ten days after October 31st, or November 10th. On the 11th of September, plaintiff wrote defendants: "If you will send us your check for goods delivered to you on your order, it will assist us greatly, as we are in need of cash, and goods are sold very close, so that we cannot afford to carry accounts to maturity. In fact, we sell all our goods with the understanding that bills will be anticipated by our customers. If you will help us out, we will try and send your goods promptly."

⁴⁸ To this defendants replied as follows: "We are in receipt of your favor of 9/11/1899, and was quite surprised to note contents. We suppose you are aware that our order calls for 600 doz. Gem vests, p., and dr. Up to date you have only shipped us about 184 doz. There is still coming to us 416 doz., which should have been shipped nearly three months ago. We will make you a proposition, since you want the money badly. Ship us 300 doz. more Gems, and we agree the same day we check the goods off to send you our check in full up to date, less anticipation."

It appears that no immediate response was made to this letter, but on the 9th of October defendants again wrote plaintiff, notifying it that, unless supplied with the underwear, they would be compelled to go into the open market and buy them, and charge plaintiff with the difference. Plaintiff replied, saying that it had some time before asked for a check in settlement for goods already delivered, and added that: "Our request was made on account of reports we received from a commercial agency to which we are subscribers, said reports being far from favorable to you or satisfactory to us; and we know of no law that will compel delivery of goods to customers whose financial standing is not satisfactory to the seller. Your refusal to pay for the goods already delivered certainly did not

justify us in shipping you more goods, and rather indorsed the report which we had received. When our account matures, we certainly will use all means in our power to collect the same in full, as called for in our invoices."

To this defendants replied, expressing their surprise at the attitude taken by the plaintiff, and offering, if it would ship three hundred dozen, to send check on the receipt of the goods. To this plaintiff replied that it would send goods on receipt of check for goods already shipped. To this defendants replied, in substance, that the bill was not yet due, but offering to receive the remaining four hundred and sixteen dozen underwear for spot cash, and authorizing shipment with draft attached to the bill of lading. This appears to have closed the correspondence.

"On the trial the court charged the jury as follows: "I charge you, as a matter of law, that if you find, as a matter of fact, that the plaintiff received a report from the commercial agency, which report gave defendants a rating that was not satisfactory— Now, the test is not whether it was actually true or not. The test is not whether they were actually poor or not. The test is, did the seller in good faith honestly believe that they were in danger? and, if they believed it, they had a right to act upon it. That is the test. To reread a little—that was not satisfactory to the plaintiff, and that plaintiff notified defendants of the fact, and offered to send the remainder of the goods if the defendant would pay for those already shipped, and the plaintiff relied upon the report, I will say in good faith, and the defendants refused then to pay for the goods already delivered to the defendants, and that the bills were to be anticipated, then and in that case you will allow no damages for the nondelivery, but would render a verdict for the plaintiff for the value of the goods delivered under the contract, with the interest thereon. . . .

"Now, you will not need to rely entirely on one person, for there are quite a number here. You will not need to say Rosen & Co. are actually insolvent. Some firms are entirely solvent, and slow-like. If the report was a true report, like in regard to their ability to pay, that is not the question for you to determine. We are not to pass upon their solvency. It is what they believed—just like a man in self-defense strikes over a man, even in no danger. We are not to judge of it; it is what he believed to be the danger. And if they were in danger, even if they had sent the goods on—even if they lay here in

the station-house—if they were in danger they could order them back; they could stop them by telegram and say, 'Bring them back to us,' because the law protects a man if he is in danger; you can bring back your goods."

In the first part of this charge, it appears, the circuit judge made the defendants' right to recoup to depend on whether the plaintiff had acted in good faith upon the report made to it by the commercial agency, and whether there had been an effort made to anticipate the payments for which the contract provides. There was no evidence ⁴⁸ of such agreement to anticipate payments. The correspondence clearly shows that a term of credit was extended to the defendants by the terms of the order itself, and the defendants were in no way in default for refusing to pay until the termination of that term.

The other proposition embodied in this charge is still more startling. The rule of law amounts to this: That if A and B make a contract, and B afterward meets C upon the street, and C says to B, "A intends to beat you in that contract," this would excuse B from performance. We have made some investigation, and have found no authority to sustain such proposition. It was open to the plaintiff to investigate the financial condition of defendants before making the contract. Failing to do this, nothing short of a breach of contract upon defendants' part, or actual insolvency, would excuse the plaintiff from fulfilling the contract on its part. Any other rule would leave a purchaser at the mercy of the seller, and could not afford a safe rule for the transaction of business.

As to the question of damages, there was testimony tending to show an advance in price of the identical goods in question by the plaintiff itself. There was also testimony tending to show that, when this contract was finally broken, defendants were unable to procure the goods in the open market; that they had contracted a large quantity of these goods at an advance of something over one dollar per dozen, and were unable to fulfill their contract. The rule of damages in case they were able to procure the goods in the open market would be the additional cost to them; but, if the goods were not obtainable, defendants would be entitled to recover the profits lost through the fault of plaintiff: *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763.

The judgment will be reversed, and a new trial ordered.

Hooker, C. J., Moore and Grant, JJ., concurred.

If Goods Sold are not delivered, the measure of damages is usually their market value at the time and place at which they should have been delivered, with interest. Special circumstances, however, may modify this rule: *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, and see the cases cited in the cross-reference note thereto. If the goods were purchased for resale, the damages may, under some circumstances, include prospective profits: *Guetzkow Co. v. Andrews*, 92 Wis. 214, 53 Am. St. Rep. 909.

SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD v. McALLISTER.

[132 Mich. 69, 92 N. W. 770.]

HUSBAND AND WIFE—Validity of Marriage.—No formal ceremony is essential to the validity of a marriage. Its validity depends upon the competency of the parties to contract it. (p. 384.)

INSURANCE, Benefit—Beneficiary.—If a Man and Woman Live and cohabit together as husband and wife in good faith, under the mistaken belief that they are competent to enter into the marriage relation, and he obtains insurance in a benefit association whose by-laws provide that payment shall be made to the wife, dependent, mother, or, etc., of the member, the money, on his death, must be paid to the woman with whom he has thus lived, rather than to his mother, who has treated them as husband and wife for a long period of years with full knowledge of the facts. (pp. 385, 386.)

INSURANCE, Benefit—Public Policy—Beneficiary—Marriage. It is not contrary to public policy to permit mutual benefit associations to issue policies of insurance in favor of those occupying marital relations to each other, in the honest belief that they are husband and wife, though they may be mistaken in their belief as to their competency to contract marriage. (p. 386.)

J. L. Hooper and L. H. Sabin, for the appellant.

Dean & Davids, for the appellee.

70 GRANT, J. Defendant Eleanor is the mother, and defendant Clara is the alleged widow, of William R. McAllister, deceased. October 2, 1890, complainant, a beneficiary association organized under the laws of Michigan, issued to William, then a resident of New York state, a policy of two thousand dollars, payable to Clara E. McAllister, his wife, as beneficiary. Subsequently William and Clara removed to Findlay, Ohio, where he died January 16, 1901. Complainant files this bill of interpleader to determine which one is entitled to the insurance.

Clara and William in 1883 entered into a contract of marriage, but no ceremony was performed. The circuit judge

found that this contract was entered into in good faith, and was consummated by a continuous living and cohabiting together as husband and wife, and by holding themselves out to the world as such, until his death. For eighteen years these parties lived in Michigan, New York, and Ohio as husband and wife, were received in society as such, were known as such in every place where they lived, and were recognized as such by the defendant Eleanor and other members of her family. She visited them, and they visited her. The circuit judge, in his finding, said: ⁷¹ "It is seldom, where the life in the home for so long a time is laid bare before a court, that the record is as clean, and the loyalty to each other and the trust and confidence in each other are as great and strong, as the proofs show it to have been in this case."

The proofs sustain this finding. William was ill for some time previous to his death, and Clara did menial work to earn money to support him and to pay the insurance dues. The defense to her claim is that she had been previously married to one Baker, and that she never had been divorced. She admits her marriage to Baker in 1875 in the state of New York; that she lived with him until 1882; that they had one child; that they separated, and she came to Michigan. Defendant Eleanor insists that there is no proof of a divorce from Baker, who is still living. The evidence upon this point is that Baker delivered to a Mr. Hall, of Gowanda, New York, a document purporting to be a decree of divorce issued from a court in Pennsylvania, dissolving the marriage of Baker and his wife. Mr. and Mrs. Hall both testify that Mr. Hall received such a document from Baker; that they read it; that it purported to be a decree of divorce; that they then sent it to Clara, at Charlotte, Michigan, where she was then living. It is proved conclusively that this document, whatever it was, was received by Clara. This was before her marriage with William. Relying upon this as a valid divorce, she and William contracted the marriage. The deposition of Baker was taken on behalf of Eleanor, and he testified that he gave her a document; that he thought it was an agreement of separation, and not a divorce; and that he was never legally divorced from her. The court held that Clara was legally entitled to the fund.

The marriage was valid if the parties were competent to contract it. No ⁷² formal ceremony is essential to the validity of a marriage: *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220.

Counsel for defendant Eleanor cite authorities holding that a marriage is void if either party thereto has another wife or husband living. The validity of a marriage does not depend upon the good faith of the parties entering into it. Both parties must be competent to contract. Unless both are single, their marriage is void, however innocently they may have entered into that relation. It is not necessary to cite authorities to this proposition. But this rigid rule has not been applied in insurance policies of mutual benefit associations, now so common, where the parties have acted in good faith. The policy in this case was not issued under section 7740 et seq. of the Compiled Laws. That was an act passed in 1893 (Act No. 119, Pub. Acts 1893), while this policy was issued in 1890. The record does not contain the articles of association under which the policy was issued. The act of 1893 expressly provides "that when the laws of any such association already provide that an affianced wife, or any other person who is dependent upon the member for maintenance, food, clothing, lodging, or education, may be made the beneficiary, payment of death benefits may be made to such beneficiaries." The briefs do not refer to the original articles of association, or cite the act under which the original association was organized. Counsel for defendant Eleanor quote a by-law of the association applicable to this case, and admitted by them to be consistent with the charter. That by-law reads as follows: "No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister," etc., "of the member."

We will assume, therefore, that this is the by-law which controlled the rights of these parties at the time the policy was issued.

It is admitted that defendant Clara was legally married to Baker, and that he is still alive. We will not determine ⁷³ whether the proofs show that she was legally divorced from him, as we deem it unnecessary to determine this question. It is clear that she believed she was, and that William also so believed. Both believed that they were competent to enter into the marriage relation. They did so, and faithfully lived by their obligation until death parted them. She was not the mistress of William, nor was this policy a "wager" policy, under *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 473, 9 N. W. 497. This contract was made in New York, and the decisions of that state

should have great, if not a controlling, force in determining the rights of these parties. *Story v. Mutual Ben. Assn.*, 95 N. Y. 474, is the parallel of this in its facts. Mary Story had in good faith occupied the position of the wife of Robert Story for sixteen years. He had another wife living. The by-laws of the association in that case required the fund to be paid over to the widow; if no widow, then to the children, etc. The court said: "It may be true that the by-law which prescribes the obligation and duty of the association on the death of a member contemplated a payment to the person who should be the lawful widow of a deceased member. But this was not a limitation of the power of the company, so as to prevent it from recognizing as the beneficiary a person who might be designated by the member as holding to him the relation of wife. Such designation made during the lifetime of the member, and assented to by the company, until changed by the mutual agreement of the member and the company, or at least until the arrangement was repudiated by one of the parties thereto, was binding."

Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816, is another similar case. The law there provided that the beneficiary must be one or more members of the assured's family, some one related to him by blood, or who should be dependent upon him. He had named as beneficiary a woman who had lived with him as his wife, and who had borne him children. She had no knowledge that he had a lawful wife living. It was held that, though she was not in fact his wife, yet ⁷⁴ she was dependent upon him, and had a moral right to look to him for support, and her claim to the fund was sustained: See, also, *Watson v. Mutual Life Assn.*, 21 Fed. 698; *Overbeck v. Overbeck*, 155 Pa. St. 5, 25 Atl. 646; *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *Supplee v. Knights of Birmingham*, 18 Week. Not. Cas. 280.

Counsel for Eleanor cite *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543. The court in that case found that for a period of about four years, with short periods of intermission, the deceased and the claimant, Kate Keener, "lived together in an unlawful, illicit and licentious way." Even in the assignments of the certificates he did not designate her as his wife. In one he designated her as his "friend, Miss Katie Burke," and in the second as "Mrs. Katie Keener, bearing the relationship to myself of wife." In such cases there is no obligation, moral or legal, resting upon the assured to care for the woman. She is

in no sense his wife, and not dependent upon him. In this case there is no taint upon either of the parties. For eighteen years after assuming this relation they were faithful to each other. Though she may have failed to show a valid divorce, we think it not contrary to public policy to permit these mutual benefit associations to issue policies in favor of those occupying such a relation in the honest belief that they are husband and wife. If the assured, the beneficiary, and the association choose to recognize such contracts as valid, we think that it does not lie in the mouths of others to deny their validity—especially in that of one who for eighteen years, with full knowledge of the facts, recognized and treated the parties as husband and wife.

The decree is affirmed, with costs.

The other justices concurred.

A Common-law Marriage is valid in most of the American commonwealths: See *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, and cases cited in the cross-reference note thereto; *Schuchart v. Schuchart*, 61 Kan. 597, 78 Am. St. Rep. 342. Compare *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74.

What Marriages are void is the subject of a monographic note to *State v. Lowell*, 79 Am. St. Rep. 361-384. The effect of a void marriage is the subject of a monographic note to *Deeds v. Strode*, 96 Am. St. Rep. 267-277. And the presumption in favor of the validity of a marriage is the subject of a monographic note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198-206.

The Beneficiary in a life insurance policy is presumed to be the legal wife of the insured, if he designates her as his wife in the certificate of insurance: *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193.

BURKHARDT v. WALKER & SON.

[132 Mich. 93, 92 N. W. 778.]

HOMESTEADS—Removal of Cloud.—Equity has Jurisdiction, at the suit of a wife, to remove a levy upon, and execution sale of, her husband's homestead. (p. 388.)

HOMESTEADS—Abandonment.—A temporary removal from a homestead with the intention of a speedy return does not constitute an abandonment. (p. 388.)

HOMESTEADS—Abandonment—Conveyance.—A conveyance of a homestead by husband and wife to a third person, who immediately reconveys to the wife for the purpose of placing the title in her, is not an abandonment of the homestead. (p. 388.)

HOMESTEADS—Sale Under Execution.—While property is a homestead, there is no interest therein which can be taken and sold under execution against the owner. (p. 388.)

W. S. Jenney, for the appellant.

B. R. Erskine, for the appellee.

¶ **CARPENTER, J.** This is a suit in chancery to set aside an execution levy on, and sale thereunder of, a house and lot in Mt. Clements. The execution issued upon a judgment in favor of defendant, and against complainant's husband. At the time of the levy the property in question was occupied as a homestead by complainant and her husband. The title stood in his name, and it was worth less than fifteen hundred dollars. Subsequently, and before the sale under the levy, complainant's husband absconded, leaving complainant in a destitute condition. To procure means for her and her child's support, complainant (with the intention of speedily returning, and with no intention of waiving her homestead rights) rented the premises in controversy from month to month, reserving only the use of a back room for the purpose of storing her furniture. A couple of months later, and three days before defendant commenced to advertise for the sale under its execution, complainant and her husband conveyed the property in question to one W. J. Dusse, who at once reconveyed the same to complainant. The court below gave complainant a decree. Defendant appeals, claiming that the decree should be reversed because: 1. Complainant has no right to resort to equity for redress; 2. By moving from and renting the property, and uniting with her husband in the conveyance to Dusse, complainant lost her homestead interest; 3. The levy and sale should be allowed to stand, subject to the homestead rights of complainant.

In answer to defendant's first claim, it is sufficient to ⁹⁵ refer to *Lozo v. Sutherland*, 38 Mich. 168, *Myers v. Weaver*, 101 Mich. 477, 59 N. W. 810, and *Hitchcock v. Misner*, 111 Mich. 180, 69 N. W. 226, which hold that equity has jurisdiction to remove a levy upon and execution sale of a homestead, and *Armitage v. Toll*, 64 Mich. 412, 31 N. W. 408, which holds that "it is as much the right of the wife, either at law or in equity, to protect the homestead rights of herself and family, as it is that of the husband."

It is a sufficient answer to defendant's second claim to say that a temporary removal, with the intention of a speedy re-

turn, does not constitute an abandonment (*Bunker v. Paquette*, 37 Mich. 79; *Kaeding v. Joachimsthal*, 98 Mich. 78, 56 N. W. 1101; *Hichcock v. Misner*, 111 Mich. 180, 69 N. W. 226), and that the conveyance to Duse was for the purpose of placing the title in complainant.

In support of the third claim for reversal, defendant says: "The complainant's homestead right, by virtue of being the wife of the execution defendant, was simply a contingent right of occupancy, not an interest in the fee. . . . The fee of the execution defendant, subject to the homestead rights of the wife, . . . and other encumbrances, can be sold on execution: . . . *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988; *Drake v. Kinsell*, 38 Mich. 232."

The most that can be claimed for these cases is that they establish the proposition that an administrator's sale, under an order of the probate court, of the homestead of the family of his intestate, subject to their homestead rights, is valid, if the order authorizing such sale is not appealed from. The case at bar is not ruled by these authorities, but it is ruled by *Lozo v. Sutherland*, 38 Mich. 168; *Myers v. Weaver*, 101 Mich. 477, 59 N. W. 810, and *Hitchcock v. Misner*, 111 Mich. 180, 69 N. W. 226, above cited, which hold, in effect, that while property is a homestead there is no interest which can be taken and sold under an execution against the owner.

It follows that the decree of the court below must be affirmed, with costs.

The other justices concurred.

ABANDONMENT OF HOMESTEAD.

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In our consideration of this subject we shall not advert to those cases which relate to the termination of a homestead by means other than abandonment, such as by waiver, estoppel or other acts of the owners while still occupying the premises. The effect of the separation of husband and wife and of conveyances or encumbrances by either of them was treated in the monographic note to *Jerde v. Furbush*, 95 Am. St. Rep. 936. A homestead has been defined as the permanent place of residence of a party claiming the benefit of the homestead act: See *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319, 44 N. W. 187. In *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757, it was held that that which is covered by the exemption is the land and not any particular claim of the title to it. "In a majority of the states the fact that premises are occupied as a homestead is all that is necessary to render them exempt from execution. But in the other states a declaration of homestead must be made and filed for record, or some other kind of record notice must be given, showing the world that the occupants intend to insist upon their exemption rights": *Freeman on Executions*, sec. 241. And in another portion of the same section, in referring to the creation of homesteads, the rule deducible from the decisions is stated as follows: "The first thing to be done to impress the homestead exemption on property is to make it a home. The law does not exempt future homesteads. It throws its protection around only that which is already consecrated by being the residence of the claimant as the home of himself and his family. The declaration which the claimant may be required to file and record does not create a homestead. It is merely legal notice that one already exists, and that the claimant desires that it shall not be longer subject to forced sale under execution. The homestead exemption cannot exist upon property upon which the claimant and his family have never resided. The fact that there is a homestead must precede the declaration of its existence. The declaration is not only false; it is also invalid if it precedes this fact. Where the law requires a declaration to be filed, the filing is of no consequence, unless it can be shown that the premises were then occupied as a homestead. It is not suffi-

cient that they had been so occupied before, or that they are so occupied after the filing." Sometimes the statutes of a state have provisions regarding homesteads which are different from those in the majority of states. Thus it was held in Utah that it was not necessary that a claimant of a homestead reside thereon if the land is used for the support of his family: *Kimball v. Salisbury*, 17 Utah, 281, 53 Pac. 1037. While in South Carolina it was held that the right of a debtor to claim land as a homestead was not in any way dependent upon his previous use of it as such: *Swansdale v. Swansdale*, 25 S. C. 389. As a general rule, it is immaterial whether the estate of the homestead claimant be an estate in fee simple, an equitable title or a mere possessory interest, as long as he occupies the property for homestead purposes: *Freeman on Executions*, sec. 242. The question of whether a homestead claimant has abandoned his homestead being mostly one of fact, no general rules can be enunciated, and the question whether an abandonment has taken place must depend upon the peculiar facts of each case: *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840. The facts most frequently relied upon as evidence of an abandonment are either the acquisition of a new homestead or a mere removal from the property claimed as a homestead. Consequently the question is mostly one of intent. However, it seems clearly settled that a homestead owner may, for purposes of health, pleasure, or any cause deemed sufficient by him, temporarily absent himself from his homestead without thereby abandoning it: *Metcalf v. Smith*, 106 Ala. 301, 17 South. 537; *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Taylor v. Hargous*, 4 Cal. 266, 60 Am. Dec. 606; *Pierson v. Truax*, 15 Colo. 223, 25 Pac. 183; *Dearing v. Thomas*, 25 Ga. 223; *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577; *Reeseman v. Davenport*, 96 Iowa, 350, 67 N. W. 301; *Moline etc. Co. v. Vanderhoof*, 36 Ill. App. 26; *Hixon v. George*, 18 Kan. 253; *Central etc. Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323, 32 S. W. 291; *Pratt v. Pratt*, 161 Mass. 276, 57 N. E. 435; *Karn v. Nielson*, 59 Mich. 380, 26 N. W. 666; *Campbell v. Adair*, 45 Miss. 170; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Austin v. Stanley*, 46 N. H. 51; *Fulton v. Roberts*, 113 N. C. 421, 18 S. E. 510; *Wetz v. Beard*, 12 Ohio St. 431; *Bowman v. Watson*, 66 Tex. 295, 1 S. W. 273; *Lindsay v. Murphy*, 76 Vt. 428; *Phillips v. Root*, 68 Wis. 128, 31 N. W. 712. Another proposition which seems to be settled is that two homesteads cannot be held by the same person at the same time: *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Sarahas v. Fenlon*, 5 Kan. 592; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456, 67 S. W. 578; *Gerrish v. Hill*, 66 N. H. 171, 19 Atl. 1001; *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755, 88 N. W. 706.

II. Essential Requisites of an Abandonment.

a. Necessity for Actual Relinquishment of Possession.—It seems to be recognized as an essential requisite of an abandonment of a homestead that there must be an actual abandonment of the premises, coupled with an intention to abandon: *Pardo v. Bittorf*, 48 Mich. 275, 12 N. W. 164; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; *National Bank of Commerce v. Chamberlain* (Neb.), 100 N. W. 943; *Little v. Baker* (Tex.), 11 S. W. 549. The same principle has been recognized in many other cases. Thus, in *Lee v. Hughes*, 25 Ky. Law Rep. 1201, 77 S. W. 386, it was held that an intention on the part of a homestead owner to remove from the state without a completion of the act would not constitute an abandonment. And in *McDannell v. Ragsdale*, 71 Tex. 23, 10 Am. St. Rep. 729, 8 S. W. 625, a homestead was held not abandoned by the desire of the owner to sell it, or by his desire to abandon it in the future, as long as he actually occupied it. So, also, the fact that parties claiming under a parol agreement to convey, the statute requiring the wife to join in a conveyance of the homestead, went into possession of the premises was held not to show an abandonment, where the old owners continued to live on the place and asserted control in many ways, making improvements, keeping stock on the premises and taking a share of the proceeds of the farm: *Alois v. Alois* (Iowa), 99 N. W. 166. And in *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. Rep. 44, 4 South. 616, the court held that a verbal agreement by the husband to sell the homestead, he receiving part of the purchase money and allowing the vendee entrance to part of the dwelling-house, would not constitute an abandonment by the husband of his wife's homestead right nor enable him to sell without her signature or consent, where he with his family continued to occupy some rooms under an agreement to pay rent for them to the vendee. So, also, in *Levingston v. Davis*, 24 Tex. Civ. 497, 59 S. W. 942, it was held that the owner of two tracts (aggregating less than two hundred acres), who designates them as his homestead, and recorded his designation, does not abandon his homestead by moving from one tract to the other. And likewise in *Crope v. Everts*, 28 Tex. 528, the mere promise of a husband and wife to exchange their homestead for other land, even though the transaction was accompanied by a surrender of part of the place, was held not to constitute an abandonment, where the homestead claimants had never ceased to reside on the place.

And it is also held that the removal of a husband or wife from the homestead by reason of deserting his or her spouse does not constitute an abandonment, where the deserted spouse remains in possession of the homestead: *Hall v. Roulston*, 70 Ark. 343, 68 S. W. 24; *White v. Clark*, 36 Ill. 285; *People v. Stitt*, 7 Ill. App. 294; *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *Blandy v. Asher*, 72 Mo. 27; *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375. Though

the contrary view was held in *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516.

b. Necessity for Intent to Abandon.—In order for acts on the part of the owner of a homestead to constitute an abandonment of the homestead, there must be an intent on the part of such owner to abandon the use of the property as a homestead: *Gates v. Steele*, 48 Ark. 539, 4 S. W. 53; *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; *Blumer v. Allbright*, 64 Neb. 249, 89 N. W. 809; *McMillan v. Warner*, 38 Tex. 410; *Scheuber v. Ballou*, 64 Tex. 166. But the duration of the intention to abandon after once formed is immaterial: *Cline v. Upton*, 56 Tex. 319. The necessity for an intention to abandon the homestead is illustrated by many of the cases. Thus, in *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 858, it was held that a wife does not lose her homestead by a temporary absence when she leaves part of her household goods in the house on the homestead premises with an intention of returning. And in *Blumer v. Allbright*, 64 Neb. 249, 89 N. W. 809, the court held that a wife was not deprived of her homestead rights because her husband left the homestead without an intention to return unless she participated in his intention. So, also, it is held that a wife loses none of her homestead rights by being driven from the homestead through the cruelty of her husband: *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190. And the detention of a husband or wife in a lunatic asylum is held not such an absence as indicates an intention to abandon the homestead: *Way v. Scott*, 118 Iowa, 197, 91 N. W. 1034; *National etc. Assn. v. Maloney*, 22 Ky. Law Rep. 1094, 60 S. W. 12; *Holburn v. Pfanmiller's Admr.*, 24 Ky. Law Rep. 1613, 71 S. W. 940; *Flynn v. Hancock* (Tex. Civ.), 80 S. W. 245. And in this connection it was held in *Central etc. Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323, 32 S. W. 291, that if a man's wife is adjudged a lunatic while the family is occupying and claiming the property as a homestead, the fact that the husband, after her confinement in an asylum, slept at his father's house part of the time and took his meals there all the time does not show an abandonment of the homestead. And in *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070, the neglect of an insane wife to make a homestead selection under a new law, changing the manner of selecting homesteads, was held not an abandonment of a homestead previously selected by her. In *Gassoway v. White*, 70 Tex. 475, 8 S. W. 117, the occupation of a business homestead of an insolvent by his assignee was held not to work an abandonment, if, as soon as the assignee discharges his trust by disposing of the goods contained in the business homestead, the owner resumes possession for business purposes.

c. Time When Intention Must be Formed.—To establish abandonment of a homestead the evidence must show not only removal from

the homestead, but that it was done with the intention of not returning, or that after such removal the intention of remaining away was formed: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202. But where the homestead is once abandoned, an intention to return can have no influence in restoring the lost homestead rights unless accompanied by an actual resumption of occupancy, but such resumption of occupancy can have no force against the rights of third persons acquired in the interim between the abandonment and the resumption of occupancy: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Carter v. Goodman*, 11 Bush, 228. In *Shepherd v. Cassidy*, 20 Tex. 24, 70 Am. Dec. 572, it was said that the intention to abandon a homestead could be changed at any time before a new one is acquired, and that it was immaterial how the change was made known or ascertained, though it was intimated a resumption of homestead rights would not be allowed as against vested rights acquired after the abandonment. And Justice Dillon, in *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577, said: "If the intention to abandon existed, we would not allow it to be resumed to the prejudice of intervening rights."

d. Requirements Where Statute Prescribes Methods of Abandonment.—In some of the states, such as in California and Idaho, the method of abandoning a homestead is expressly prescribed by statute. Thus, in Idaho a homestead can only be abandoned by a declaration of abandonment or by a conveyance, acknowledged and executed by the husband and wife, if the claimant is married: *Mellen v. McMannis* (Idaho), 75 Pac. 98. In *McQuade v. Whaley*, 31 Cal. 526, the court held that a homestead claimed under the act of 1851 was abandoned where the declaration of intention to continue, required by the act of 1861, was not filed within the time limited by that act. In *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87, the court held that a homestead once lawfully created could only be abandoned in the manner pointed out in the code, which provided that a homestead can be abandoned only by a declaration of abandonment or a grant thereof, and that such abandonment is only effectual from the time of its filing. Hence, it is not abandoned by the claimants ceasing to reside upon the premises nor by a lease thereof and the purchase of other property upon which they have erected another home in which they are residing. In *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362, the court, in construing an instrument to have the effect of abandoning the homestead rights of the parties, said that the law has prescribed no form of words for the abandonment of a homestead, and that the meaning of an instrument intended to have that effect is to be determined by the rules which control the interpretation of other contracts.

III. Who may Effectuate an Abandonment.

In *Titan v. Moore*, 43 Ill. 174, the court said: "The husband, being the head of the family, has the right to determine and control their residence. And where he intentionally removes from and

abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens which have attached during such abandonment." And in *Farmers' etc. Loan Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062, the husband in applying for a loan on the property made affidavit that it was not used as a homestead; the court, in passing on his right to abandon the property, said: "While the act of March 18, 1887, is a limitation upon the right of the husband to convey his homestead except by the consent of his wife, it does not in any manner affect or restrict his right of abandonment. This right he has by virtue of his marital and parental authority, and when he has chosen to exercise it, as he did here, he renders the property which had formerly been his homestead the proper subject of alienation without his wife's concurrence: *Thompson on Homesteads and Exemptions*, secs. 42, 276, 483; *Titman v. Moore*, 43 Ill. 169; *Guioed v. Guioed*, 14 Cal. 506, 76 Am. Dec. 440; *Thorns v. Thorns*, 45 Miss. 263; *Story on Conflict of Laws*; *Williams v. Swetland*, 10 Iowa, 51." See, also, *Wilmoth v. Gossett*, 71 Ark. 594, 76 S. W. 1073. The Minnesota supreme court in *Kramer v. Lamb*, 84 Minn. 468, 87 N. W. 1024, stated the rule as follows: "It is claimed that the acts and intentions of the husband do not necessarily control the legal status of the wife. If, during his absence, the wife and family had remained at the homestead, a different question would be presented. But it has been decided in this state (*Williams v. Moody*, 35 Minn. 280, 28 N. W. 510), that as head of the family it is for the husband to determine and fix the domicile of the family, including that of the wife, so that when he and his wife remove from the homestead his intention fixes the character of the removal as an abandonment." In *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257, it was held that a homestead may be abandoned by a widow in the same manner as a husband could. And it is also held that the abandonment of a homestead by a mother who is a widow terminates her children's rights in the homestead property: *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220, 69 N. E. 863; *Shepard v. Brewer*, 65 Ill. 583. And in *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840, the court held that a widow residing upon her homestead, who remarries and immediately removes with her children and household goods to the home of her new husband without expressing an intention of returning to her old homestead, must be considered as abandoning the old homestead, notwithstanding that otherwise as between herself and children, the homestead was indivisible and not alienable until her youngest child became of age.

IV. Acts Indicating Intent to Abandon.

a. Conveyances, Leases and Contracts Relating to the Property.

1. **Conveyances and Contracts.**—It does not seem disputed that a conveyance by the husband and wife purporting to grant the

land comprising the homestead in presenti to the grantee will operate as an abandonment of the homestead: *Security Loan etc. Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467; *McDonald v. Crandal*, 43 Ill. 231, 92 Am. Dec. 112. In *Garibaldi v. Jones*, 48 Ark. 230, 2 S. W. 844, the court, after remarking on the objects of the homestead exemption provided by the Arkansas constitution, and the rights of the minor children therein, said: "It follows, then, the widow cannot alienate the homestead of her deceased husband. But she is not bound to accept and enjoy the beneficent provisions made for her by the constitution. Being under no disability, she can abandon the homestead and renounce the benefit of the rents and profits thereof, and thereby surrender and forfeit all claims to it. She can do so by any act which evinces such to be her purpose. If she sells and conveys it, she most unquestionably evinces such intention, and thereby forfeits her homestead rights: *Wright v. Dunning*, 46 Ill. 271; *Orman v. Orman*, 26 Iowa, 361; *Phipps v. Acton*, 12 Bush, 375; *Whittle v. Samuels*, 54 Ga. 548; *Locke v. Rowell*, 47 N. H. 46. When the widow of Anderson conveyed the lands in question to appellees and abandoned them, they became assets in the hands of the administrator for the payment of the debts against the estate." In the principal case (*Burkhardt v. Walker*) it was held that a conveyance of a homestead by the husband and wife to a third party, who at once reconveyed to the wife, did not constitute an abandonment. In *Huginin v. Dewey*, 20 Iowa, 568, such a transfer to a third person to be held in trust for the wife was held not to operate as an abandonment. A ruling similar to that in the principal case was also made in *McHugh v. Smiley*, 17 Neb. 626, 24 N. Y. 277. In *Jones v. Currier*, 65 Iowa, 533, 22 N. W. 663, the court held that where the husband conveys his homestead to a third person, who reconveys to the wife, he will be considered to have abandoned it in the absence of proof that his object was merely to vest the title in her. And in *Re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568, an agreement between a husband and wife for the division of a homestead and deeds executed in pursuance to that agreement, but which were not recorded, was held not to operate as an abandonment under the California code. In *Sanford v. Finkle*, 112 Ill. 146, the husband, after having received a deed for certain land from his wife's parents, surrendered the deed to them for the purpose of having them convey the land to his wife; his deed was destroyed and a new one made to his wife. The court held that the transaction was not an abandonment of his homestead rights. In *Nichol v. Davidson County*, 76 Tenn. (8 Lea) 389, it was held under the act of 1868, providing for a homestead to a housekeeper or head of a family, such right was not lost by a transfer from husband to wife. In *Murphy v. Farquhar*, 39 Fla. 550, 20 South. 681, it was held that an attempt to transfer the legal title to the wife and removing with the family to a place several miles distant, where the claimant and his family resided

for five years, visiting the homestead only as one would look to a piece of property located so near at hand, was sufficient to justify a finding of abandonment. In *Thomas v. Smith*, 8 Kan. App. 855, 54 Pac. 695, a wife, after being deserted by the husband, quitclaimed the homestead and moved away; she sued her husband for divorce but failing to get jurisdiction, dismissed the suit. Pending the proceedings, the husband conveyed to her grantee and she subsequently joined in the deed. The court held that the facts constituted an abandonment. Leaving the homestead after an invalid execution sale and failing to return or to in any way question the sale for more than five years was held in *Newman v. Franklin*, 69 Iowa, 244, 28 N. W. 579, sufficient to justify a finding of an abandonment. In *Dortch v. Benton*, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638, it was held that the claimant of a homestead does not forfeit his homestead rights by making a conveyance thereof with intent to defraud his creditors. And in *Anderson v. Cosman*, 103 Iowa, 266, 64 Am. St. Rep. 177, 72 N. W. 523, a wife was held to have abandoned her homestead rights in lands held by her husband under a contract of purchase reserving title in the vendor, where her husband, with her knowledge and consent, surrenders said contract to the vendor who, under an agreement between the parties, conveys the land to a purchaser from the husband, and the husband and wife thereafter remain on the land as tenants. It was held in *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549 that a homestead right, when vested in the head of a family, cannot be waived by a contract, in advance of its assertion, since contracts of that nature are against public policy. And in *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256, an antenuptial agreement to waive homestead rights in the husband's estate was held against public policy. In *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W. 421, a daughter's parents promised their son in law that if he would erect a house on land belonging to them, clear the land and put it into cultivation, that he could have it when they were done with it. The son in law did so. It does not distinctly appear whether the contract was verbal or in writing. The court held that the parents abandoned their homestead rights in the property. Oral contracts for the sale of homesteads, followed by possession by the grantee were held to constitute an abandonment of the grantor's homestead rights in *Drake v. Painter*, 77 Iowa, 731, 42 N. W. 526, and *Winkleman v. Winkleman*, 79 Iowa, 319, 44 N. W. 556.

2. Leases.

A. For Whole Property.—The fact that an owner rents his homestead during an absence therefrom is a circumstance tending to show an abandonment, but is not necessarily inconsistent with an intention to return to the property: *Wapello County v. Brady*, 118 Iowa, 482, 92 N. W. 717; *Herrick v. Graves*, 16 Wis. 157. *Ordi-*

narily a lease of a homestead for life is conclusive evidence of an abandonment of it, but where the lease reserves to the lessor the right to return to it and it is his intention to return there is no abandonment: *Gates v. Steele*, 48 Ark. 539, 4 S. W. 53. Occupation of a homestead by a tenant by sufferance, without payment of rent, is an occupation by the owner and tends to show an intention of returning: *Macavenny v. Ralph*, 107 Ill. App. 542. In *Palmer v. Riddle*, 197 Ill. 45, 64 N. E. 263, it was held that where the owner rented his homestead for three years on a verbal understanding that the lessee would surrender the premises if the owner desired to return to the state before the expiration of the lease, there was no abandonment. In that case the departure was for the benefit of the health of the owner's husband. It is quite generally held that the temporary renting of the homestead does not constitute an abandonment of it: *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Dallemand v. Mannon*, 4 Colo. App. 262, 35 Pac. 679; *Hixon v. George*, 18 Kan. 253; *Dulanty v. Pyncheon*, 6 Allen, 510; *Earll v. Earll*, 60 Mich. 30, 26 N. W. 822; *Spratt v. Early*, 169 Mo. 357, 69 S. W. 13; *Locke v. Bowell*, 47 N. H. 46; *Wetz v. Beard*, 12 Ohio St. 431; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341. But where the premises are permanently rented without intention of returning, the homestead rights therein are abandoned: *In re Vincent*, 115 Fed. 236. See, also, in this connection, *Pitney v. Eldridge*, 58 Kan. 215, 48 Pac. 854; *McClenaghan v. McEachem*, 47 S. C. 446, 25 S. E. 296; *Williams v. Cleveland*, 18 Tex. Civ. App. 153, 44 S. W. 689. In *Wurzbaach v. Menger*, 27 Tex. Civ. 290, 65 S. W. 679, the fact that the owner had been renting his houses for over ten years, and that the rent is necessary for the support of his family, was held conclusive evidence that the premises were permanently set apart as tenant houses. In *Warren v. Kohr*, 26 Tex. Civ. 331, 64 S. W. 62, an eight year lease which required the lessee to erect certain cattle-pens on the premises, thereby unfitting it for homestead purposes, and which gave the lessee an option to a renewal, was held sufficient to support a finding of abandonment. In *Peebles v. Bunting*, 103 Iowa, 489, 73 N. W. 882, a widow after the death of her husband removed to another place, where she remained for about nine years; she then returned to the farm for a period of seven years; then she removed to another place for three or four years, making arrangements with her children, who cultivated the farm, to receive rent from them. The court held that she could not claim homestead rights in the farm. In *Bland v. Putman*, 132 Ala. 613, 32 South. 616, an owner was held to have abandoned his homestead, where he rented it for a series of years and moved away without reserving any part of the dwelling for use as his residence and without filing the claim of homestead provided for by the Alabama code. And in *Gist v. Lucas*, 122 Ala. 557, 25 South. 41, the removal from the state for four years, together with the rental

of the homestead during such period with only occasional visits of inspection, and a failure to reoccupy the premises upon return to the state, was held to constitute an abandonment.

B. For Part of Property.—In the principal case the temporary rental of a homestead from month to month, reserving only the use of a back room for the purpose of storing furniture, with the intention of speedily returning, was held to constitute no abandonment. In *Simpson v. Biffie*, 63 Ark. 289, 38 S. W. 345, the renting of some of the rooms of a residence for a hotel was held not to abandon the homestead rights. In *Heathman v. Holmes*, 94 Cal. 295, 29 Pac. 404, the court, in holding that the renting of part of a building does not deprive the owner of his exemption of the building as his homestead, if it continues to be the bona fide residence of the family, said: "It would be strange, indeed, if the occupants of a house could not use part of it for family revenue, no matter how favorable the opportunity might be to do so, without forfeiting the home itself. There is nothing in the homestead laws which prohibits such use, and it has been settled here that 'the homestead statute is a remedial measure and should be liberally construed.'" In *Farmer v. Hale*, 14 Tex. Civ. 73, 57 S. W. 164, the owner of a small tract of land near a village rented it from year to year, but reserved the use of a pasture. There was evidence showing intention to return to the residence thereon. The court held that there was no abandonment. And in *Billings v. Matlage* (Tex. Civ.), 82 S. W. 805, the rental of a business homestead under a lease which gave the lessor the right to terminate it upon sixty days' notice, and which reserved a portion of the premises for the use of the lessor, was held insufficient to show an abandonment, there being, however, evidence showing an intention to resume the former mercantile business therein. In *Metcalf v. Smith*, 106 Ala. 301, 17 South. 537, the renting of the cultivable part of an agricultural homestead and the permitting of the father of the tenant to occupy a room in the house without payment of rent, was held insufficient to show an abandonment.

b. Change in Character or Use of the Property.—Where part of a residence homestead is fitted for a store and rented for such purposes, it loses its character as a residence homestead: *King v. C. M. Hapgood Shoe Co.*, 21 Tex. Civ. 217, 51 S. W. 532. So, also, where the owner of a residence homestead converts a portion of it into a business homestead by the erection of a saloon, which he leases, it shows an abandonment: *Warren v. Kohr*, 26 Tex. Civ. 331, 64 S. W. 62. But the temporary possession by a tenant whose rights and use of the property are not inconsistent with the homestead rights of the owner will not deprive the premises of their homestead character: *Upton v. Coxen*, 60 Kan. 1, 72 Am. St. Rep. 341, 55 Pac. 284. Nor will a homestead be deemed abandoned from the fact that the owner neglects to use a portion of his dwelling-house, or that he appropriates a portion of it to some other use: *Phelps v.*

Rooney, 9 Wis. 70, 76 Am. Dec. 244. In *Anderson v. Sessions*, 93 Tex. 279, 51 S. W. 874, the fact that a lot, which was purchased for residential purposes, is used for raising vegetables for the owner's family was held not to show an abandonment, where the owner still intended to build on the lot when able. In *Shook v. Shook*, 21 Tex. Civ. 177, 50 S. W. 731, it was held that where a person buys a city lot for residential purposes, builds a residence in the middle of the lot, then builds a fence separating a cottage, which was on the premises, from his residence, and rents the cottage, there is no abandonment of any part of the premises if no intent to segregate the premises existed. In *Drew v. Wooten*, 27 Tex. Civ. 456, 66 S. W. 331, a married man, who owned a block containing twelve lots, built a house on a corner lot and resided therein; he sold one of the lots without his wife joining in the conveyance. But prior to the execution of the deed he allowed the grantee to place the lumber which was subsequently used in building a house, on the lot. The court, in holding that the lot sold was abandoned for a residence homestead, said: "It has been several times held in this state to be within the power of the husband acting in good faith, without the concurrence of the wife, to contract the homestead area by abandonment, he being the head of the family. There must, however, be an actual abandonment, mere intention to abandon, as evidenced by his deed and the like, not being sufficient where the homestead use continues. But where, prior to or contemporaneous with the delivery of the deed and surrender of actual possession of a part of the homestead premises, there is both the good faith intention on the part of the husband, who makes the deed, to abandon and an actual cessation of the occupancy and use of the part so conveyed as a part of the homestead, such conveyance by him alone is not within the constitutional inhibition." But in *Clements v. Crawford County Bank*, 64 Ark. 7, 62 Am. St. Rep. 149, 40 S. W. 132, the platting of part of a homestead into lots, naming it a village, filing the plat, and selling part of the lots so platted, was held not to create a town or village so as to limit the homestead to a village homestead nor to constitute an abandonment of the unsold part so platted. In *O'Brien v. Woeltz*, 94 Tex. 148, 86 Am. St. Rep. 829, 58 S. W. 943, 59 S. W. 535, the act of setting part of the owner's land apart as a business house and executing a mortgage thereon to build the business structure was held an abandonment as a residence homestead.

c. **Acquisition of New Homestead.**—Inasmuch as one person cannot hold two homesteads at the same time (see subdivision I), the removal from one homestead coupled with the acquisition of a new homestead elsewhere is conclusive proof of abandonment of the former homestead: *Wolf v. Hawkins*, 60 Ark. 262, 29 S. W. 892; *Titman v. Moore*, 43 Ill. 169; *Davis v. Kelley*, 14 Iowa, 523; *Woodbury v. Luddy*, 14 Allen, 1, 92 Am. Dec. 731; *Donaldson v. Lamphrey*,

29 Minn. 18, 11 N. W. 119; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Carrigan v. Rowell*, 96 Tenn. 185, 34 S. W. 4; *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792, 10 S. W. 458. In *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456, 67 S. W. 578, it was declared that a homestead may be abandoned by the owner moving elsewhere with his family and occupying other land which he declares to be his homestead. And in *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220, 69 N. E. 863, it was held that a widow who has a homestead abandons it when she removes to her husband's homestead on her remarriage. See, also, *Ghent v. Boyd*, 18 Tex. Civ. 88, 43 S. W. 891, to the same effect.

d. Removal from the Property.

1. In General.—It may be stated as a general rule that temporary absence from a homestead with the intention on the part of the owner to return will not constitute an abandonment of the homestead: *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Gray v. Patterson*, 65 Ark. 373, 46 S. W. 730; *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838; *Davis v. Kelley*, 14 Iowa, 523; *Hixon v. George*, 18 Kan. 253; *Moses v. White* (Kan. App.), 51 Pac. 622; *Campbell v. Potter*, 16 Ky. Law Rep. 585, 29 S. W. 139; *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299, 31 South. 38, 55 L. R. A. 724; *Dulanty v. Pynchon*, 6 Allen, 510; *Kalding v. Joachimsthal*, 98 Mich. 78, 56 N. W. 1101; *Campbell v. Adair*, 45 Miss. 170; *Duffey v. Willis*, 99 Mo. 132, 12 S. W. 520; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 841; *West River Bank v. Gale*, 42 Vt. 27; *In re Phelan's Estate*, 16 Wis. 76; *Phillips v. Root*, 66 Wis. 128, 31 N. W. 712. But an actual removal from the homestead with no intention to return constitutes an abandonment: *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577; *Maguire v. Hanson*, 105 Iowa, 215, 74 N. W. 776; *Smith v. Kidd*, 123 Mich. 193, 81 N. W. 1092. In *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299, 31 South. 38, 55 L. R. A. 724, it was said that a change of residence from a homestead to an adjoining place, if the result of calamity and not a voluntary act, is not proof of an abandonment. And in *Anderson v. Davis*, 18 Utah, 200, 55 Pac. 363, it was held to be no abandonment where the owner, when leaving the homestead temporarily, left many personal effects on the place. But in *Porter v. Harrison*, 124 Ala. 296, 27 South. 302, it was held under quite similar facts that such a removal was an abandonment. In *Edmonson v. White*, 8 N. Dak. 72, 76 N. W. 986, it was held that a tract of land did not cease to be a homestead because at a particular time there was no habitable house on it, where the owner, though living elsewhere fully intended to return and reside on the property. In *Leake v. King*, 85 Mo. 413, a claim to a homestead was sustained on the ground that the owner's family left the state because of the disturbed condition of Missouri at

the close of the Civil War. In *Black v. Black's Admr.*, 11 Ky. Law Rep. 147, 12 S. W. 147, it was held that there was no abandonment. In that case the owner moved from his village homestead to a farm in which his wife had an interest; he had frequently stated that the removal was temporary, and he had left some personal property at the village homestead. He died while on the farm, but his widow testified that he would shortly have returned to the village homestead. In *Collins v. Boyett*, 87 Tenn. 334, 10 S. W. 512, it was held that the removal of a wife and husband, after a conveyance by the husband to which she had verbally assented, was not an abandonment of her homestead rights, though a contrary ruling had been made in *Levison v. Abrahams*, 82 Tenn. (14 Lea) 836. In *Farmers' etc. Loan Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062, it was held that an owner who removes from his homestead and makes application for and procures a loan thereon by declaring in writing that the land is not his homestead, thereby abandons. And in *Blackman v. Moore-Handley etc. Co.*, 106 Ala. 458, 17 South. 629, it was held that where a person leaves his homestead because it is too small for his own and his second wife's family, and afterward rents it, the facts show an abandonment. In *Wilmoth v. Gossett*, 71 Ark. 594, 76 S. W. 1073, it was held that a widow would not be precluded from claiming a homestead in her deceased husband's lands which her husband and herself had occupied for many years preceding and up to his death, merely because she also owned lands of her own upon which they had formerly lived. The court, in making its decision, said: "The husband's home must be the wife's; she must follow him, and not the reverse, is the legal status. He is the controlling spirit in this legal unity, and has a right to select and also to abandon the home at his will."

2. **For Business Reasons.**—A temporary removal from the homestead for the purpose of more conveniently conducting business or for the purpose of being better able to earn a living for the family of the homestead owner, is not generally deemed an abandonment of the homestead where the homestead owner has a bona fide intention to return to the homestead: See *Brown v. Watson*, 41 Ark. 309; *Robinson v. Swearingin*, 55 Ark. 55, 17 S. W. 365; *Robson v. Hough*, 56 Ark. 621, 20 S. W. 523; *Wilks v. Vaughan* (Ark.), 83 S. W. 913; *Painter v. Steffen*, 87 Iowa, 171, 54 N. W. 229; *McFarland v. Washington*, 12 Ky. Law Rep. 376, 14 S. W. 354; *Ragsdale etc. Co. v. Watkins*, 25 Ky. Law Rep. 506, 76 S. W. 45; *Walton v. Walton*, 76 Miss. 662, 71 Am. St. Rep. 540, 25 South. 166; *Eckman v. Scott*, 84 Neb. 817, 52 N. W. 822; *Quigley v. McEvony*, 41 Neb. 73, 59 N. W. 767; *Lindsay v. Murphy*, 76 Va. 428. In *Omaha Brewing Assn. v. Zeller* (Neb.), 93 N. W. 762, it was held that the fact that a homestead owner resided for business reasons nearly six years elsewhere and was registered as a voter in an adjoining city did not conclusively show an abandonment. And temporary removal to another state for a year or two at a time, attending to

business there or earning money for the support of the homestead owner's family was held not to constitute an abandonment where the intention to return was bona fide: *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037; *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549. And in *Collins v. Bounds*, 82 Miss. 47, 34 South. 355, the temporary removal from a rural homestead because of the death of the only horse which the owner possessed, thereby preventing the cultivation of the land, the husband and wife going to the father in law's place to assist in the marketing of his crop, was held not an abandonment. In *White v. Roberts*, 112 Ky. 788, 66 S. W. 758, the homestead owner and his wife left their agricultural homestead, moving to a town, where they engaged in a business which yielded a larger income than they could have made on the farm. The court held that their indefinite intention of returning to the farm was not sufficient to prevent their removal from constituting an abandonment. So, also, in *Murphy v. Farquhar*, 39 Fla. 350, 22 South. 681, a husband and wife conducted a grocery store several miles from their former homestead; they conducted the store for five years, frequently going to the homestead, which was a farm, and staying there for several days, but taking their provisions along with them; the husband voted as a resident from the place where he conducted the store. The court held the homestead to have been abandoned. But in *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202, the fact that a husband and wife removed from their rural homestead to a neighboring town where the husband pursued the occupation of shoemaking, was held not to show an abandonment, where it was also shown that the greater part of their household goods were left in the farm together with their stock, and that his wife divided her time between the farm and town abode, doing part of the cooking for the family on the farm. And in *Mills v. Mills*, 141 Mo. 195, 42 S. W. 709, a farmer moved to town, purchased a store building wherein he lived, conducting a business therein; he spoke of the farm as his home and obtained supplies from it; a married son managed the farm with the help of a man hired by the father; the greater part of their household furniture remained at the farm and his wife often stayed there; the court held that the farm was not abandoned. In *Boot v. Brewster*, 75 Iowa, 631, 9 Am. St. Rep. 515, 36 N. W. 649, the court held that an abandonment of the homestead should not be inferred when it appears that the owner left the premises with his family for the purpose of earning a living; that some furniture was left in the house; that the premises were so rented that the lessee was a tenant at will; that a homestead was not acquired elsewhere, the owner testifying that he always intended to return; but the court held that in such cases the long duration of the absence was a matter entitled to consideration, though by no means conclusive.

3. On Account of Election or Appointment to Office.—In *Schoellkopf v. Cameron*, 19 Tex. Civ. 598, 47 S. W. 548, it was held that a shoemaker, elected county treasurer for several terms and having an office as such in the courthouse, but who occasionally during that time worked at repairing shoes in a shop conducted by him, did not as a matter of law abandon his homestead rights to his shop by being elected to said office, business homesteads being allowed in Texas; the court, in rendering its opinion, said: "There are decisions to the effect that one engaged in the performance of his public duties as an officer is entitled to a place of business wherein he may perform those duties, and that the statute would exempt such a place where his official duties were performed from forced sale; but there is no decision holding in terms that the election to an office and the performance of the duties required of the officers, of itself, will necessarily operate as an abandonment of any previous business in which the officer may have been engaged. There is no inconsistency between the duties required of the county treasurer and the business carried on by a shoemaker. Of course, it is not intended by the law that one engaged in these different branches of service should be entitled to two different places which should be exempt, but when so engaged in business in these two different ways, which of the two places where it is carried on shall be exempt is a question of fact for the jury. In this particular case, Cannady was performing his official duties in a room in the courthouse set apart to him by the commissioner's court. It is clear that he asserted no claim to that room and that he was occupying it really upon sufferance. There his official duties were performed; but because he may have performed his official duties at that particular place he could claim no exemption in that property because it was removed from the reach of his creditors, independent of the question of exemption, and he had no right in it, neither did his creditors, except a naked occupancy, by consent of the commissioners' court. His official duties might well be performed there and still his business as a shoemaker might continue upon the premises in controversy. A merchant who is elected to an office the duties of which are not incompatible with his private business does not necessarily have to retire from his mercantile pursuit, but he can well continue that business and at the same time perform his official duties." In *McInturf v. Woodruff*, 77 Tenn. (9 Lea) 671, it was held that the removal, by one appointed to the office of jailor during the will and pleasure of the sheriff, to the jail and his occupation of the jail for a year as his residence did not constitute an abandonment of his homestead, where he intended to return to the homestead on the expiration of his appointment. The same ruling was made in *Moline Plow Co. v. Vanderhoof*, 36 Ill. App. 26, where the homestead owner was appointed a guard at one of the state penitentiaries. In *Mattingly v. Berry*, 94

Ky. 544, 23 S. E. 215, the homestead claimant was for a time a tax collector subsequent to his removal from his homestead, but the question of the effects of such appointment did not seem to be of controlling force in that case. In *Griffin v. McKinney*, 25 Tex. Civ. 432, 62 S. W. 78, the homestead owner removed to a town primarily to educate his children; he went into business in the town, voted there and ran for alderman. The court in that case held that the homestead was abandoned, though it does not appear that the fact that he had run for alderman was the sole reason for the decision of the court.

4. **On Account of Health or Old Age.**—A homestead right is not abandoned by a temporary removal from the homestead for the benefit of the health of the owner or some members of his family, provided of course that there is an intent to return to the homestead: *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Sloss v. Sullard*, 63 Kan. 884, 65 Pac. 658; *Davis v. Pritchard*, 9 Ky. Law Rep. 914, 7 S. W. 549; *Jones v. Robbins*, 74 Tex. 615, 12 S. W. 824; *Gibbs v. Hartenstein* (Tex. Civ.), 81 S. W. 59. In *Hughes v. Newton*, 89 Fed. 213, the owner of a hotel homestead left it on account of ill-health and traveled for thirteen years previous to his death in various places; during his absence he rented the hotel, but reserved a room therein for himself and wife and kept his furniture there; he frequently returned and frequently stated that it was his home, though on one occasion he casually stated he was making his home elsewhere. The court held there was no abandonment. In *Minnesota etc. Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019, a temporary removal to another state for the benefit of the health of the homestead owner's wife was held not an abandonment, even though the husband had voted in the other state while residing there, the court holding that the circumstance of voting being overcome by other evidence of the intention to return. And in *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394, it was held that a widow had not abandoned her homestead merely because during her last sickness she had gone to her daughter's house to be taken care of and had rented the homestead to get an income with which to pay the expenses of her sickness. But in *Baker v. Jamison*, 73 Iowa, 698, 36 N. W. 647, the court held that where a widow who is quite old and in poor health, having none of her children living with her, leaves, rents her homestead, sells most of her household goods, and thereafter lives with her married daughters, she thereby abandons it. But in *Gray v. Patterson*, 65 Ark. 373, 67 Am. St. Rep. 937, 46 S. W. 730, 1119, the court held that a homesteader, who on account of his advanced age and inability to get some one to live with him takes up his abode with his grown daughter, who lives but a short distance away, but while so living with her constantly expresses a desire to return to the old homestead, does not by such

removal abandon it. So, also, in *Hitchcock v. Misner*, 111 Mich. 180, 69 N. W. 226, it was held that the taking up of a residence with the homestead owner's father for the purpose of caring for him, he being very old and the son's house being too small to accommodate both families, is not necessarily an abandonment.

5. **For Better Care or Education of Children.**—It is also held that a temporary removal from a homestead for the purpose of educating the children of the homestead owner is not such a removal as amounts to an abandonment of the homestead: *Herring v. Johnston*, 24 Ky. Law Rep. 1940, 72 S. W. 793; *Campbell v. Adair*, 45 Miss. 170; *Gunn v. Wynne* (Tex. Civ.), 43 S. W. 290; *Thomas v. Williams*, 50 Tex. 269; *Aultman v. Allen*, 12 Tex. Civ. 227, 35 S. W. 679; *Birdwell v. Burleson*, 31 Tex. Civ. 31, 72 S. W. 446; *Phillips v. Root*, 68 Wis. 128, 31 N. W. 712. In *Cincinnati etc. Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446, it was held that the fact that the homestead owner moved from his rural homestead into a town, storing part of his household goods in his farmhouse and expressing an intention to return to the farm as soon as his daughter finished attending school, did not show an abandonment even though he registered and voted while thus residing in the town. But in *Flynn v. Riley*, 60 Neb. 491, 83 N. W. 663, the court held the facts sufficient to support a finding of abandonment. In that case the owner moved from his rural homestead to the city, where he lived for about seven years, purchasing a residence and voting in the town. Not having fully paid for the city residence, he relinquished it, moving back to the rural homestead after a levy had been made on it. He contended that his removal to the city was merely for the purpose of educating his children. In *Locke v. Bonnell*, 14 Tex. Civ. 354, 37 S. W. 250, the court held that a city homestead was not abandoned by the fact that the owner, on the death of his wife, moved with his two children, aged respectively three and five years, to his mother's place on a farm in order to give them her care. He had rented his city property, but retained one room, and had expressed his intention to return when the children became old enough to attend school. In *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864, 39 N. W. 537, a woman residing with her husband and children over a saloon adjoining a dance hall, after the death of her husband, removed from the building, leaving some furniture therein, intending to return later on, at all events as soon as her daughters became married. The court held that her removal was not abandonment.

6. **With Contingent Intent to Return.**—The decisions in regard to removals in which the intent to return is not definite or is made contingent upon the happening of some event are apparently not harmonious, but it would seem from a close reading of them that they are really not inconsistent. To constitute an abandonment of the homestead there must be an intent to abandon. Hence, where the

removal from the homestead is claimed to have the effect of operating as an abandonment, it is necessary that such removal was intended as an act of abandonment. "The going away may have been experimental, with the view of seeking employment or engaging in business, and, if such employment or business proved satisfactory, then of making a permanent change of residence. If such was the case, while the intention to change the residence remains thus conditional, the absence from home does not amount to an abandonment of the homestead rights": Freeman on Executions, sec. 248; Imhoff v. Lipe, 162 Ill. 282, 44 N. E. 493; Painter v. Steffen, 87 Iowa, 171, 54 N. W. 229; Walton v. Walton, 76 Miss. 662, 71 Am. St. Rep. 540, 25 South. 166. In Ball v. Ramsey, 25 Ky. Law Rep. 1268, 77 S. W. 692, the owner of a homestead, having purchased other property, moved on the newly purchased property with the intention of selling it at an advanced price, and then returning to the homestead. He had left his son in law in possession of the homestead, and also left a large amount of household goods on the homestead. He afterward by mutual consent, had his purchase of the new property canceled. The court held that there was no abandonment of the homestead. In Mills v. Von Boskirk, 32 Tex. 560, the husband and wife in May, 1865, left their homestead, stating that they were leaving the country; that they had cotton on the road which they intended to take to Mexico; that they were dissatisfied with the condition of the country and did not know whether they would ever return. In October, 1867, the premises were attached. The parties had never returned, but it was not shown that they had acquired any new homestead elsewhere. The court held that the proof was insufficient to show an abandonment.

The rule was also well expressed in Wolf v. Hawkins, 60 Ark. 262, 29 S. W. 892. The facts and rule as stated by the court are as follows: "In this case Hawkins not only left his home in the country and moved his family and household furniture and utensils to a residence he had purchased in town, mortgaged and rented his former homestead, sold most of his farm stock, and entered the mercantile business, but he does not directly testify that he intended to return. He states that, at the time he left the place in controversy, and took up his residence at Boles, he did not know whether he would return or not. He intended, he said, 'to retain the place and return to it if he quit business.' We do not think that this is sufficient to rebut the presumption of abandonment which arises from his having moved his family and household utensils to a new building acquired by him apart from the old homestead. His intention to retain the ownership of the place is not inconsistent with the abandonment of it as a homestead, and the intention to return 'if he quit business' does not evince an actual or present intention to return, for there is nothing to show that he intended to quit business. 'The purpose to return was on a contingency which might never happen. It was, therefore, an abandonment for the present, with a possibility of a future change of purpose'": Citing Lehman v. Bryan, 67 Ala. 558; Kimball

v. Wilson, 59 Iowa, 638, 19 N. W. 748; Smith v. Bunn, 75 Mo. 559. In Lehman v. Bryan, 67 Ala. 558, the court held that the homestead was abandoned where a husband left the homestead with his family, intending to return if his wife's health improved, but did not return, the court saying, "the animus revertendi was not a present intention existing at the time of the removal, but a mere possible, or at most probable, future purpose." So, also, in Kimball v. Wilson, 59 Iowa, 538, 13 N. W. 748, the facts were such as are likely to often arise in removals from one place to another. It was there held that a removal from a rural homestead to a town with the owner's family, intending to permanently reside in the town if successful in the practice of law, otherwise to return to the rural homestead, amounted to an abandonment of the rural homestead. The court, after reviewing the facts, said: "From this it is abundantly evident that his purpose was to reside in town and pursue his profession permanently if he was able to make a living by it. We find, then, an intention to abandon qualified by a contingency. But the contingency was one which the debtor intended to avoid. The removal with such intention, we think, constituted an abandonment." In Kloss v. Wylezalek, 207 Ill. 328, 99 Am. St. Rep. 220, 69 N. E. 863, the court said: "An equivocal intention to return is not sufficient: Cabeen v. Mulligan, 37 Ill. 230, 87 Am. Dec. 247. In other words, a person cannot cease to occupy a homestead with the intention that he or she may or may not return, depending upon future conditions or circumstances, and still retain the homestead right." In Cabeen v. Mulligan, 37 Ill. 230, 87 Am. Dec. 247, just referred to, it was held that a homestead is abandoned where the husband removes to another state, where he resides for several years, and declares before leaving that if he liked the country and could do well in his business, he would remain, but if not he would return, and after his return declared that when he left he expected to remain, but found it to his interest to return. In Conway v. Nichols, 106 Iowa, 358, 68 Am. St. Rep. 311, 76 N. W. 68, it was held where the owner of a rural homestead removes to a town, intending to reside there permanently if he can sell his rural homestead and expecting to be able to sell it, the removal is an abandonment, although he intended to return if he could not make the sale. In Re Flannagan, 117 Fed. 695, a bankrupt engaged in mercantile business made an assignment and went to reside on the farm with his mother, devoting his time to attending to her farming interests. His only hope of resuming business was the remote contingency of his being able to compromise with his creditors. The court held that he did not have such a fixed, definite intention to resume business as would exempt the property as a business homestead under the Texas law.

e. Effect of Various Acts After Removal.

1. **Offering to Sell the Property.**—Of course, an offer to sell is not inconsistent with an intent to retain the property if a satisfactory price is not obtained; hence, it does not constitute an abandonment,

though it is a circumstance in combination with other acts tending to show an abandonment. In *Dunn v. Tozer*, 10 Cal. 167, the fact that both the husband and wife were anxious to sell their homestead, and the husband had made repeated efforts to sell, but failed because a satisfactory price could not be obtained, was held not to show an intention to abandon the homestead. In *Wapello County v. Brady*, 118 Iowa, 482, 92 N. W. 717, it was held that the inference from offering to sell is stronger than that arising from declining offers to purchase, since the latter are entirely consistent with a purpose to keep with some other object in view than occupancy. In *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 311, 76 N. W. 681, it was held if a homestead owner removes with an intention and expectation of selling it and making his home in another place, he will be deemed to have abandoned the homestead, although he intends to return if he fails to sell it. In *Aultman v. Allen*, 12 Tex. Civ. 227, 33 S. W. 679, the fact that the owner of a homestead had offered to sell it while temporarily absent from it was held not sufficient to show an abandonment. In most of the cases where offers to sell or trade the homestead property are shown there were other facts indicating the intention to abandon: See *Myers v. Elliott*, 101 Ill. App. 86; *Dunton v. Woodbury*, 24 Iowa, 74; *Cotton v. Hamil*, 58 Iowa, 594, 12 N. W. 607; *Mosteller v. Readhead*, 6 Kan. App. 512, 50 Pac. 948; *Harbison v. Tennison* (Tex. Civ.), 38 S. W. 282.

2. *Registering or Voting at New Domicile.*—The fact that the homestead owner after his removal from his homestead has exercised his right of suffrage in the district wherein his new residence is located is frequently urged as a strong circumstance showing an intention to permanently reside in the new place. The courts, however, do not generally attach as much importance to such a circumstance as would be generally supposed, although they regard it as a circumstance, and some courts deem it a strong circumstance. In *Minnesota etc. Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019, the language of the court in passing on the question probably expresses the general view of the courts on the subject. The court said: "In this case there is the very significant circumstance that Mr. McCrossen exercised the elective franchise in the state of Washington three times while residing there. We must presume that the essentials of citizenship are the same in that state as here, and that McCrossen's assertion of the right of citizenship, as indicated, was inconsistent with his possessing a homestead in the state of Wisconsin. But we cannot say that such a circumstance is conclusive. He violated the law in voting, or he committed perjury in testifying that his residence in the state of Washington was for mere temporary purposes, and that his intention at all times was to return to the Wisconsin homestead. The trial court concluded from all the circumstances that he testified to the truth. It seems, looking at the record alone, that there is room for a different conclusion.

But there are many cases in the books where it has been held that the mere act of voting at a particular place is not conclusive on the question of residence. Many well-considered cases of that kind are cited to our attention in the brief of counsel for respondents." Citing *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675, 28 N. W. 512; *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 512; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Campbell v. Potter*, 16 Ky. Law Rep. 535, 29 S. W. 139. Then, continuing, the court remarked: "In this case the circumstance of voting in the foreign jurisdiction was rebutted by the positive evidence of Mr. McCrossen of his purpose in going to the state of Washington, and his intention at all times to return, and the circumstance established by his evidence and that of other witnesses that the removal to Washington was for the sole purpose of benefiting Mrs. McCrossen's health." In *Painter v. Steffen*, 87 Iowa, 175, 54 N. W. 229, the court, in answer to the argument based on voting at the place of new residence, said: "The strongest point urged in support of the abandonment is one that Mr. Painter, since being at Ottumwa, has registered under the law for voting, and has voted there one or more times. Were he the only party in interest, we might regard such acts as conclusive against him, for they are quite, if not absolutely, inconsistent with a purpose to retain his residence at Bloomfield. It appears, however, that the wife had no knowledge of these acts, and the title to the house and lot in Bloomfield is in her. This latter fact is, perhaps, of no special moment, as the husband cannot, by his acts, divest the wife of her homestead rights": Citing *Lunt v. Neeley*, 67 Iowa, 97, 24 N. W. 739; *Bradshaw v. Hurst*, 57 Iowa, 745, 11 N. W. 672.

In a later case, *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616, the court referred to several of the earlier cases on the subject; it said: "He voted in Humboldt, in 1891, and this is a very strong circumstance tending to show a permanent change of residence. He explains it, however, by saying he supposed one might vote 'where he resided temporarily, and got his washing done.' This erroneous impression is quite common, and we cannot regard the mere fact of voting in a precinct other than that of the homestead conclusive of an intention to abandon it. The point was not decided in *Painter v. Steffen*, 87 Iowa, 171, 54 N. W. 229, and was not regarded controlling in *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 311, 76 N. W. 681. While, as a general rule, a man will be presumed to reside where he exercises the right of suffrage, this is subject to such explanations as will show the real intention of the party in removing from the former residence, whether *animo revertendi*." The question also arose in *Kramer v. Lamb*, 84 Minn. 468, 87 N. W. 1024, though it does not seem to have been the sole ground for holding the homestead abandoned. In touching on the homestead claimant's explanations of his intentions, the court remarked that: "A man's

intentions are not necessarily fixed by what he may declare them to be. They are determined by his conduct and the circumstances surrounding him. It is unreasonable to assume that the plaintiff Kramer voted at the elections in Elysian ignorantly, and without intending to be identified as a resident of that place. Such conclusion is not justified because it would lead to the inference that he was a willful violator of the election laws." The court in that case also held that where the wife joins her husband in his absence from the homestead, his intentions fix the character of the removal. In *Myers v. Elliott*, 101 Ill. App. 86, the fact that the husband voted at the place to which they had removed, and the wife announced that the old homestead was for sale, was held not conclusive evidence of abandonment. And in *Omaha Brewing Assn. v. Zeller* (Neb.), 93 N. W. 762, the fact that a debtor resided for business reasons nearly six years elsewhere, and was registered as a voter at a place other than the homestead, was held not conclusive evidence of abandonment. In *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 511, it was held that the mere act of registering as a voter at a place other than at the homestead was not conclusive evidence that the removal from the homestead was intended to be permanent. The question as to the weight to be attached to the fact of voting at a place other than at the homestead was raised in the following cases, though in most all instances in connection with other evidence tending to show abandonment: See *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237; *Murphy v. Farquhar*, 39 Fla. 550, 22 South. 681; *Titman v. Moore*, 43 Ill. 169; *Cobb v. Smith*, 88 Ill. 199; *O'Hair v. Wilson*, 124 Ill. 351, 16 N. E. 256; *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 284; *Imhoff v. Lipe*, 162 Ill. 282, 44 N. E. 493; *Cotton v. Hamil*, 58 Iowa, 594, 12 N. W. 607; *Benbow v. Boyer*, 89 Iowa, 494, 56 N. W. 544; *Atchison Sav. Bank v. Wheeler's Admr.*, 20 Kan. 625; *Smith v. Mattingly*, 11 Ky. Law Rep. 975, 13 S. W. 719; *Campbell v. Potter*, 16 Ky. Law Rep. 535, 29 S. W. 159; *Hoffman v. Buschman*, 95 Mich. 538, 55 N. W. 458; *Thompson v. Tillotson*, 56 Miss. 36; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675, 28 N. W. 512; *Flynn v. Riley*, 60 Neb. 491, 83 N. W. 663; *Zettlemayer v. Mears* (Tex. Civ.), 80 S. W. 1047; *Kutch v. Holley*, 77 Tex. 220, 14 S. W. 32.

3. **Removal to Another State.**—The mere fact that a homestead owner has removed to another state does not seem to be regarded as of any special weight in determining whether he intended to abandon his homestead. The question whether the removal was intended to be permanent or temporary is determined in such case in the same manner as if the removal was to a place within the state: *Willbanks v. Untriner*, 98 Ga. 801, 25 S. E. 841; *Benbow v. Boyer*, 89 Iowa, 494, 56 N. W. 544. It was, however, held in an early Iowa case that such a removal to another state was *prima facie* evidence of abandonment: *Orman v. Orman*, 26 Iowa, 561. In most of the cases in which the fact of removal from the state appears, the question of abandon-

ment is treated in the same manner as if the removal were to some place within the state, the character of the removal being made to depend upon whether there was at the time an intent to return. In some states the right to a homestead exemption being dependent upon the owner being a resident of the state, the right may be lost by residence in another state (See *Baker v. Leggett*, 98 N. C. 304, 4 S. E. 37; *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516), but even in such cases it would be necessary to show intent in order to determine where the residence really is intended to be. The fact of the owner having removed to another state appears in the following cases: *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *Smith v. Kneer*, 203 Ill. 264, 67 N. E. 780; *Leonard v. Ingraham*, 58 Iowa, 406, 10 N. W. 804; *Perry v. Dillrance*, 86 Iowa, 424, 53 N. W. 280; *Kuhnert v. Conrad*, 6 N. Dak. 215, 69 N. W. 185; *Roach v. Hacker*, 2 Lea, 653; *McClellan v. Carroll* (Tenn. Ch.), 42 S. W. 185; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426.

f. *Effect of Length of Time of Absence.*—"While the law does not intend that the homestead shall be converted into a prison by making the continuous personal occupancy of the premises the absolute basis upon which the homestead right is dependent, yet it cannot be doubted that the length of time that the claimant is absent from his locus in quo will constitute an important factor, in connection with other circumstances, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred, by reason of abandonment. Prolonged absence from the homestead, like a removal of the family, is sufficient to cast the onus of rebutting the presumption of abandonment on the claimant of the homestead": *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840. In *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247, the court, in discussing this subject, said: "It would be manifestly unjust to hold where the absence was prolonged indefinitely by sickness or other misfortune, that the length of time of the enforced absence should seriously affect the question of abandonment." So, also, in *Bunker v. Paquette*, 87 Mich. 79, the court very aptly remarked: "If the intention of the party as gathered from all the facts and circumstances is to govern, as we think it should, then the length of time the party is absent, although a circumstance to be taken into consideration, yet standing alone cannot be considered as conclusive. If time alone was to be the guide, it would be very difficult to draw the line which should stand as an unerring guide in all cases." The duration of the absence undoubtedly is material as showing the nature of the absence and the purpose of the owner in being thus absent. The duration of the absence is generally a circumstance considered in all cases in which the removal from the homestead is claimed to be an act of abandonment. As generally bearing on the subject, see *Farnum v. Borders*, 119 Ill. 228, 10 N. E. 550; *Repenn v. Davis*, 72

Iowa, 548, 34 N. W. 326; Maguire v. Hanson, 105 Iowa, 215, 74 N. W. 776; Hitchcock v. Minner, 111 Mich. 180, 69 N. W. 226; Kramer v. Lamb, 84 Minn. 468, 87 N. W. 1024; Heaton v. Sawyer, 60 Vt. 495, 15 Atl. 166.

WOLF BRICK COMPANY v. LONYO.

[132 Mich. 162, 93 N. W. 251.]

BOUNDARIES—Equity Jurisdiction.—If a person is in possession of land, claiming as owner, with the line surveyed as the original line recognized and acquiesced in as the true line by his adjoining owner for more than twenty years, such adjoining owner may be enjoined from moving the boundary fence upon the premises. (pp. 413, 414.)

BOUNDARIES—Equity Jurisdiction.—If a bill in equity filed to enjoin the defendant from moving a boundary fence upon premises occupied by complainant, under claim of title for more than twenty years, alleges that defendant disputes complainant's title, defendant, by answering without demurring, voluntarily submits the question of the title to the court, and cannot deny its jurisdiction to determine it. (p. 415.)

BOUNDARY FENCES—Acquiescence.—If a fence has been recognized by adjoining owners of land as on the true line for more than twenty years, either party is estopped to deny that it is on the true line whether it was originally established on the true line or not. (p. 415.)

E. F. Conely and O. B. Taylor, for the appellant.

R. I. Lawson, for the appellee.

¹⁶³ GRANT, J. Complainant and defendant own adjoining lands. The bill of complaint alleges that the line fence between them has been established for more than twenty years; that complainant purchased its land in 1886; that the line fence was then worn out and broken down in some places, and it erected another fence in place thereof; that such fence has remained ever since, and been recognized by the parties as the true line; that on July 17, 1901, defendant attempted to tear down this fence, and did in fact tear down about one hundred feet thereof, with the intention of erecting a new line fence six feet easterly of the old fence; that complainant is informed that defendant claims that the true line commences at a point six feet east of the present line fence; that complainant immediately notified defendant of its rights, and not to interfere with or move the fence. The prayer is for a per-

petual injunction against the defendant, prohibiting the removal of the fence. The bill was filed July 18, 1901.

Defendant answered, denying all the material allegations of the bill; alleging that said fence was not on the line; that it had been moved, removed, shifted, and rebuilt a number of times; that some of the ground (removed for the purpose of making brick) had been taken away, and the fence rebuilt, "but not upon any line that had been established by survey, agreement, or otherwise." The answer further admits that the defendant did, on July 17th, tear down a part of said fence near the south end, and erect the same upon what he claimed to be the true line, and that he intended to take up all the old fence, and place it upon the line which he claimed to be the true one.

Replication was duly filed, and proofs taken in open court. The court did not pass upon the merits of the controversy, but dismissed complainant's bill upon the sole ground that the jurisdiction of a court of equity had not been properly invoked by the complainant.

104 1. The court did not find that complainant was not in possession, but dismissed the bill upon the sole ground that there was a dispute as to the boundary line, which should be tried in a suit at law. That complainant was in possession on the seventeenth day of July, when defendant commenced to remove the fence, is clearly established by the evidence. It, being in possession, could not bring an action of ejectment; the defendant could. It was his clear duty to do so, rather than to attempt by force to remove this old fence to the line which he claimed: *Wilmarth v. Woodcock*, 66 Mich. 331, 336, 33 N. W. 400. Complainant was under no obligation to stand by, see the defendant build the fence upon another line, and then bring an action of ejectment. Defendant could not prevent complainant from maintaining this action by the removal of a small portion of the fence. It invoked the aid of the court to restrain this unjustifiable action on the part of the defendant as soon as it learned that he had commenced such removal. It moved seasonably. The right to maintain this action is clearly sustained by the following decisions of this court: *Stewart v. Carleton*, 31 Mich. 270; *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475; *Vier v. City of Detroit*, 111 Mich. 646, 70 N. W. 139; *Campbell v. Kent Circuit Judge*, 111 Mich. 575, 70 N. W. 141. In *Campbell v. Kent Circuit Judge*, in an opinion by my brother Montgomery, the

cases relied upon by the defendant to sustain his contention are distinguished from cases like this.

Counsel for defendant cites and relies upon *Bresler v. Pitts*, 58 Mich. 347, 25 N. W. 311, and *Andries v. Detroit etc. Ry. Co.*, 105 Mich. 557, 63 N. W. 526. In *Bresler v. Pitts* the express object and prayer of the bill were to settle the boundary lines of complainants' estate. The bill ¹⁸⁸ alleged that "the location of the forty-feet line [the line in dispute, described in the deed as "a line forty feet above the border of the river at high-water mark"] is uncertain, and difficult of determination, and that the parties dispute their boundaries." It was properly held that a bill in equity will not lie for the sole purpose of settling disputed boundaries.

Andries v. Detroit etc. Ry. Co., 105 Mich. 557, 63 N. W. 526, is a similar case. The main object of the bill was "to establish the line where the fence is as the true line." No doubt in fact existed as to the location of the true line. Two former suits brought to this court involving the issue had settled the true boundary line against the contention of the complainant: *City of Detroit v. Detroit etc. R. R. Co.*, 23 Mich. 173; *Tapert v. Detroit etc. Ry. Co.*, 50 Mich. 267, 15 N. W. 450. The other lot owners had built their fences in accordance with those decisions. The railway company not only had not acquiesced in this fence as the boundary line, but had always disputed it.

The language of those cases applies where a boundary line is sought to be established, and not where a party is in possession, claiming as owner, with the line surveyed as the original line recognized and acquiesced in as the true line for from twenty to thirty years. The rule of those cases applies where there is a well-recognized dispute as to the true boundary line, and the purpose of the bill is to ascertain and establish it. Under the allegations of this bill, as well as the proofs, there never was any such dispute until the defendant undertook to remove this fence by force, and thus compel the complainant to resort to the law when he himself was in position to bring a suit at law in an orderly and proper way if he chose to do it. To give defendant such a right would be a reproach to the law. This case comes clearly within the statute.

2. Complainant's bill showed that defendant disputed complainant's title. If he denied the jurisdiction of the court to test the question, it was his duty to demur to the ¹⁸⁸ bill. By

answering, he voluntarily submitted this question to the court, and cannot now be heard to deny its jurisdiction: *Stockton v. Williams*, Walk. Ch. 120, 127. Where possession is alleged, and is denied by the answer, a question of fact as to possession is presented, and we do not hold that in such a case, if the evidence should disclose that complainant was out of possession, a suit in equity could be maintained.

3. It is unnecessary to go into details upon the merits. We are entirely satisfied that complainant has proved by a clear preponderance of evidence that the fence had been established and recognized by both parties as on the true line for a period of more than twenty years. Whether this fence was originally established upon the true line is a question foreclosed by the acquiescence of the parties.

"A long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared."

"Long practical acquiescence in a boundary between the parties concerned may constitute such an agreement on it as to be conclusive, even if it had been erroneously located": *Diehl v. Zanger*, 39 Mich. 601. See, also, *Husted v. Willoughby*, 117 Mich. 56, 75 N. W. 279, and authorities there cited.

The decree is reversed, with costs, and decree entered in this court for the complainant.

Hooker, C. J., Moore and Montgomery, JJ., concurred.

That Long Acquiescence in a boundary line between adjoining proprietors may operate as an estoppel, see *Jones v. Pashby*, 67 Mich. 450, 11 Am. St. Rep. 590; *Krider v. Milner*, 99 Mo. 145, 17 Am. St. Rep. 549; *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786. Consult the note on this subject to *Turner v. Baker*, 27 Am. Rep. 239-244.

McBRIDE v. SCOTT.

[132 Mich. 176, 93 N. W. 243.]

RELEASE of One Joint Tort-feasor releases the others, although it is agreed that they shall not be discharged. (p. 421.)

S. E. Engle, for the appellant.

E. D. Babst, O. Kirchner, Brennen, Donnelly & Van De Mark and Walker & Spaulding, for the appellees.

176 MONTGOMERY, J. The plaintiff brought this suit against a large number of defendants. The defendants demurred to the declaration. Judgment passed for the defendants. The case was appealed to this court, reversed, and remanded: McBride v. Scott, 125 Mich. 517, 84 N. W. 1079. At this stage of the proceedings two of the defendants, Moore and Wiggins, paid to the plaintiff fifteen hundred and seven dollars and sixty-eight cents, and were given a release in the following terms:

"Whereas, the supreme court has held that in the various Wonderland cases all the defendants were liable **177** upon the allegations in the plaintiff's declaration; and whereas, James H. Moore and Enoch W. Wiggins are desirous of settling for their own individual liability, and to be therefore released from any further liability as to themselves personally; and they having paid to me the sum of one thousand five hundred and seven dollars and sixty-eight cents, to be applied upon my claim for damages in this cause, I do hereby release the said Moore and Wiggins from all further liability, but reserving distinctly and expressly all my rights and claims against each and all of the other defendants for any and all sums, in addition to the sum above paid, which I may be found entitled to. In other words, it is distinctly understood that no rights whatever are released as against the other defendants, and that the only benefit they may or shall receive by reason hereof is such as allowed by law in giving to them the benefit of the sum above paid by way of reduction pro tanto of the damages for which this suit was brought.

"The said Moore and Wiggins, in further consideration hereof, agree each to attend and give his testimony when called upon by due legal subpoena, and to furnish such plans, speci-

fications, contracts, deeds, or other documents of any description whatever which may be required upon the trial relating to the matter in this suit, should the same be within their possession or control."

The case was thereupon discontinued as to Moore and Wiggins. The other defendants interposed a plea puis darrein continuance, setting up this discharge of Moore and Wiggins as a bar to the action. The replication to this plea set out the agreement above quoted. The defendants demurred to the replication. Judgment passed for defendants on the demurrer, and the plaintiff brings error.

The question is very clearly presented by the record as to whether a discharge of one or more of numerous joint tort-feasors is a bar to a further action against the remaining tort-feasors in a case where the plaintiff in form reserves the right to proceed against the remaining tort-feasors, and where the plaintiff does not acknowledge full satisfaction for the wrong complained of. The question never has been directly determined by this court, and it is not free from doubt. In 8 Bacon's Abridgment, Bouvier's edition, title "Release," page 277, it is said: ¹⁷⁸ "If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged; because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact."

That such is the effect of a bare release at the present day, plaintiff's counsel concedes. But it is urged that, as the plaintiff had the right originally to proceed against one or all of the wrongdoers until full satisfaction is obtained, no one of the defendants has a right to complain of any arrangement made with his codefendant for an adjustment of the plaintiff's demand as against such defendant, unless either by a formal release under seal, which conclusively imports full satisfaction, or full satisfaction in fact. And authorities are not wanting which sustain this contention. On the other hand, it is contended that the discharge of one of several tort-feasors amounts in law to a satisfaction of the plaintiff's demand, and this without regard to the question of whether the release be by instrument under seal or by parol agreement.

One of the earliest American cases upon the subject is *Ruble v. Turner*, 2 Hen. & M. (Va.) 38, in which several had been

guilty of an assault. An agreement, not under seal, was made between the plaintiff and one defendant, by which satisfaction was acknowledged for the part which such defendant took, and an attempt was made to reserve the right as to the other defendants. The court held this reservation inoperative, Mr. Justice Tucker saying: "It is a rule of construction that, if there be any clause or condition in a deed which is either contrary to law or repugnant to the nature of the estate created, it is void. Now, here the question is whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him; and I hold that he was, for the reasons already given. What, then, is the effect of this? The law says that if one joint trespasser be released, or make accord and satisfaction, ¹⁷⁹ it shall bar a recovery against all the others. The plaintiff can no more change the law in this particular by any subsequent proviso or condition than he could, after a grant in fee simple by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law; neither of which will it be contended that he could do. The proviso, then, is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants."

In 9 Bacon's Abridgment, Bouvier's edition, page 547, appears the following: "Trespass against five. The plaintiff accepts a note from two, for a sum to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction as for the other defendants. The right to recover damages is gone as to all."

In *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534, it appeared that there were several joint defendants. A note was executed, of which the court said it was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with the express stipulation that it should not discharge the other cotrespassers. The court said: "An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all. They all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction; but he can have but one recompense in damages for the same injury. The plaintiff here

agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged; and he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, but also of the persons from whom he would recover that recompense. 180 The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge."

Brown v. Kencheloe, 3 Cold. (Tenn.) 192, was decided in 1866. In this case the record does not clearly show a distinct reservation of the right of action as against the other wrongdoers, but it discloses a settlement and discharge of several of the joint tort-feasors, and it was held that a discharge of one discharged all. To the same effect is *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370. See, also, *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

The plaintiff cites *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752. In this case there were several joint wrongdoers, and a receipt was given to one in full of all dues, debts, and demands to date. The court declined to follow *Ruble v. Turner*, 2 Hen. & M. (Va.) 38, and basing its decision upon *Herrington v. Harkins*, 1 Rob. (Va.) 591, held that the payment did not discharge the other wrongdoers.

The case of *Matthews v. Manufacturing Co.*, 3 Rob. (N. Y.) 711, is much relied upon. In this case there was a reservation in the following words: "It being expressly understood and agreed that I do not hereby release or prejudice any claim, suit, or demand which I may have against any other person or persons or corporation for any matter or thing arising out of, or connected with, or relating to, any shipment or consignment," etc.

The court held that this release of one joint wrongdoer did not discharge the other defendant. The value of this case as an authority is much impaired by a decision of the appellate division of the supreme court of New York in *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066. This was a case in which the question was directly presented. There were several joint trespassers. The defendants pleaded release to

Duncan, a cotort-feasor. The ¹⁸¹ release of Duncan was read in evidence, and plaintiff reserved therein all right of action and claim for damages for negligently causing the death of plaintiff's intestate against the defendants and all other persons who controlled the premises. The court held this release to be a bar, because the defendants were joint tort-feasors.

The authority of *Matthews v. Manufacturing Co.*, 3 Rob. (N. Y.) 711, was also directly questioned in *Mitchell v. Allen*, 25 Hun, 543. In that case three were sued for negligence. One was discharged upon payment of two hundred and eighty-five dollars, but with a stipulation reserving the right of action against the other defendants. It was contended that this release did not amount to a discharge of the other defendants, for the reason that it was not a technical release under seal, the plaintiff relying upon *Matthews v. Manufacturing Co.*, 3 Rob. (N. Y.) 711. The court say of *Matthews v. Manufacturing Co.*: "The record of the case is meager. Neither the nature of the action nor the contents of the release are stated."

The court further say: "This stipulation, not being under seal, cannot operate as a release, but it acknowledges a payment from Markham, for which it releases him from further claim of the plaintiff. So far as he is concerned, the stipulation was an accord and satisfaction for the tort. There is no doubt that the plaintiff is entitled to but one satisfaction for her injury. It is not necessary that this satisfaction be by way of a judgment, and satisfaction from one party discharges the others. The plaintiff, not seriously denying all this, insists that her discharge of Markham arises solely out of her contract, and can extend no further than the express provision of the contract will permit. But, while Markham was discharged from his liability by the contract, the discharge of Allen and Porter arises as a necessary legal result from the satisfaction by and discharge of their joint tort-feasor. When Markham was discharged, the action as to them was barred as a matter of law, and no contract between plaintiff and Markham can prevent the legal effect of his satisfaction."

Another case which, to a certain extent, supports the contention of the plaintiff, is *Ellis v. Esson*, 50 Wis. 138, ¹⁸² 36 Am. Rep. 830, 6 N. W. 518. The opinion is by Mr. Justice Taylor, and, because of his great ability, is entitled to considerable weight. He rests his decision, however, in part upon the case in 3 Rob. (N. Y.), which, as we have seen, has not been followed by the courts of New York. Furthermore, the

court in *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, distinctly reserve the question as to the effect of a release of one tort-feasor with a reservation of the right of action as against the others "in an action for assault and battery, false imprisonment, or similar actions," such as the present, "in which the damages rest mainly in estimation and opinion." This reservation in the opinion of the court upon this subject detracts very materially from the force of the case as an authority, for it is difficult to conceive in principle how any such distinction can be drawn. If the discharge of one tort-feasor, as matter of law, operates to discharge his cotort-feasor in any case, we are not able to see how the question of difficulty in establishing the exact damages can affect the holding in the particular case.

We are of the opinion that the better rule is that contended for by defendants in this case; that to admit of a settlement with one tort-feasor under such circumstances as are here presented, and to hold that a reservation such as is here attempted saves the right as to other tort-feasors, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation; or, as is said in *Brown v. Kencheloe*, 3 Cold. (Tenn.) 192: "The plaintiff in many instances would operate upon the fears of the defendants, and get from each full damages for the trespass committed."

The judgment will be affirmed, with costs.

Hooker, C. J., Moore and Carpenter, JJ., concurred.

Grant, J., did not sit.

*While the Principal Case is supported by perhaps the numerical weight of authority, its soundness is more than doubtful. The court, in considering the New York decisions on the subject, seems to overlook the latest utterance of the court of appeals of that state: See the monographic note to *Abb v. Northern Pac. Ry. Co.*, 92 Am. St. Rep. 882; *Gilbert v. Finch*, 178 N. Y. 455, 93 Am. St. Rep. 628.*

RICK v. SAGINAW BAY TOWING COMPANY.

[132 Mich. 237, 93 N. W. 632.]

CONFLICT OF LAWS—Negligence.—Cases to recover for personal injury caused by negligence are governed by the law of the place of the injury, provided such law is not opposed to the public policy of the state where the action is brought. (pp. 423, 424.)

CONFLICT OF LAWS—Comity—Public Policy.—Before a court of any state is justified in refusing to enforce a right of action accruing under the laws of any other state or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interests of the citizens of the state of the forum, and it does not follow that because the statute differs from the law of the forum, it is contrary to the public policy of the state. (p. 424.)

NEGLIGENCE—Fellow-servants.—If the mate of a vessel gives general directions for the doing of work thereon, and a fellow-servant is injured through his misuse of the material provided, the owner of the vessel is liable, if the evidence shows that it was the duty of the mate to attend to any work he ordered done, and to see that it was done himself, and that he was hired for that purpose. (p. 425.)

NEGLIGENCE—Contributory—Question for Jury.—If a plank staging is let down over the side of a vessel, and held by a rope in such manner as to allow it to tip, contrary to the customary manner of fastening such rope, whereby a servant of the owner of the vessel falls into the water and is drowned, the question of the negligence of such owner, of the contributory negligence of his servant, and of the assumption of risk by the latter, must be submitted to and determined by the jury. (p. 425.)

Crane & Crane and R. A. McKay, for the appellant.

Simonson, Gillett & Clark, for the appellee.

235 MONTGOMERY, J. This action, which was based upon the Canadian statute hereinafter referred to, is brought to recover damages resulting from causing the death of plaintiff's intestate by negligence. The decedent was in the employ of the defendant as a wheelsman on board its tug "Charleton." The declaration charges that one Brown was acting as mate of the "Charleton" at the time of the accident, and that Brown ordered the crew, consisting of the deckhands and decedent, who was wheelsman, to throw over the staging and scrape the outside of the tug. The staging or scaffold upon which this work was to be performed consisted of a plank fourteen or fifteen feet long, twelve to sixteen inches wide, with cleats near either end, five feet long, nailed to the plank at right angles, so that on either side there was an extension of nearly two feet,

and the staging, when suspended, would be by these cleats held away from the side of the tug. When the order to scrape down the side of the boat had been given, the testimony tends to show, the decedent went to get a pail or pails, and other members of the crew, including one Crow, swung the staging over. When decedent returned, they were putting the staging over. There was testimony tending to show that the customary way was to use two lines for this purpose. On the occasion in question but a single line was used, with a loop at either end, into which the end of the plank was inserted. The result was that, when swung, there was nothing to prevent the plank or platform from tipping, and there was testimony from which the inference could be drawn by the jury that it was because of the tipping of ²³⁹ the plank that the decedent was thrown into the water and drowned. At the close of the plaintiff's case the circuit judge directed a verdict for the defendant, apparently upon the two grounds: That the decedent was a fellow-servant of the one responsible for the swinging of the staging (and whether he deemed responsibility to rest upon the mate, Brown, or upon Crow, is not quite apparent from the record), and also upon the ground of contributory negligence. Upon this ruling the plaintiff assigns error.

A large number of interesting questions are presented in the brief of the learned counsel for the defendant. The question of first importance—the one which meets us at the threshold of the case—is whether the Canadian statute upon which the plaintiff relies is to be enforced in its entirety in this state. This statute dispenses with the immunity of the employer from liability for the negligence of a fellow-servant when personal injury is caused to a workman “by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, or by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed”: 1 Ont. Rev. Stats. 1897, c. 160, sec. 3, subds. 2, 3. It is the contention of the defendant that, while the courts have frequently stated the rule that cases of personal injury are governed by the law of the place of the injury, this rule is subject to the qualification that the foreign statute, which, under the doctrine of comity, is to be enforced in this state, must not be against the public policy of the state, and that the

phrase "public policy" has not the same meaning as in criminal jurisprudence, and that the public policy of the state of the forum depends merely upon whether the right conferred in the state where the injury took place is similar to the right conferred under like circumstances in the state where the ²⁴⁰ action is brought. Authorities may be found which, perhaps, will sustain this contention in its entirety; but the tendency of the modern decisions is to hold that, before the court of any state is justified in refusing to enforce a right of action accruing under the laws of any other state or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interest of the citizens of the state of the forum, and that it does not follow that, because the statute differs from the law of the forum, it is contrary to the public policy of the state, within the meaning of this rule: See 22 Am. & Eng. Ency. of Law, 2d ed., 1379, 1380; Rorer on Interstate Law, 2d ed., p. 217 et seq.; Dennick v. Railway Co., 103 U. S. 11, 26 L. ed. 439; Hanna v. Grand Trunk Ry. Co., 41 Ill. App. 116. For an able and learned opinion, reviewing the authorities, see Herrick v. Minneapolis etc. Ry. Co., 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

Defendants's counsel cite and rely upon the case of Bettys v. Milwaukee etc. Ry. Co., 37 Wis. 323, which was decided in connection with Anderson v. Milwaukee etc. Ry. Co., 37 Wis. 321. The court in Herrick v. Railway Co. refuse to follow the latter case, and point out, we think, very clearly, that by the weight of modern authority the rule contended for by the plaintiff in this case is the prevailing rule. We hold, therefore, that the plaintiff's rights are to be determined by the law of Canada: See Wingert v. Wayne Circuit Judge, 101 Mich. 395, 59 N. W. 662; Turner v. St. Clair Tunnel Co., 111 Mich. 578, 66 Am. St. Rep. 397, 70 N. W. 146, 36 L. R. A. 134. We do not overlook the contention of the defendant that this action is a penal action. We do not so regard it, and think the contention sufficiently answered by the reasoning of the court in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123.

Was there negligence on the part of the mate in directing the work of swinging this scaffold, and in permitting it to be done in the manner in which it was? Defendant contends that there was not; that he might give general ²⁴¹ directions, and if there was material with which the work could be done

at hand and on the boat, as the evidence tends to show was the case here, he would not be liable for the misuse by the fellow-servants of the deceased of the material which he had supplied: *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Erickson v. Victoria etc. Min. Co.*, 130 Mich. 476, 90 N. W. 291. There would be force in this contention but for the fact that there is testimony by the witness Bridge, who was a sailor on the tug "Howard," to which the "Charleton" was fastened, at the time of the accident, and who had himself been a mate on schooners and was familiar with the duties to the effect that it is rulable for the mate to attend to any work which he orders done, and to see that it is done, and to oversee the work himself; that that is what a mate is hired for. We think this testimony sufficient to raise a question for the jury as to whether a neglect of duty on the part of the mate was a cause of the injury.

The testimony that the staging was not properly swung is, to our minds, very clear. If two lines had been employed, one at either end of the staging, as is customary, or if a single line had been employed, and had been drawn around the cleat at either end, it would have been impossible for the plank to tip up, and the injury would not have happened, so that there was negligence in swinging the plank in the manner in which it was swung is hardly open to dispute; at least, it opened a fair question for the jury.

But the defendant contends that the decedent assumed the risk, as, it is said, the manner in which this staging was swung was open to his observation. It is true that, by a minute inspection, he could have known that the rope was not fastened around the cleats; but it would have taken a somewhat careful investigation to show this, standing upon the deck as the staging was swung. In our opinion, it was not a case in which the court should have withdrawn from the jury the question of whether the decedent was negligent in descending to this staging to do the work which he had been ordered to do.

²⁴³ We think the views expressed furnish sufficient guidance for a retrial of the case, and direct that the judgment be reversed, and a new trial ordered.

Hooker, C. J., Moore and Grant, JJ., concurred.

A Cause of Action arising under the statutes of another state may be entertained when not inconsistent with the law or policy of the state where the action is brought: See the monographic notes to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355; *Eingartner v. Illinois*

Steel Co., 59 Am. St. Rep. 869-885; and the subsequent cases of Bergman v. Inman, 43 Or. 456, 99 Am. St. Rep. 771; McGinnis v. Missouri Car etc. Co., 174 Mo. 225, 97 Am. St. Rep. 553. That a cause of action for personal injuries or wrongful death is transitory, see St. Louis etc. Ry. Co. v. Haist, 71 Ark. 258, 100 Am. St. Rep. 65, and cases cited in the cross-reference note thereto.

The Law of the State in which an employé is injured by the negligence of a fellow-servant determines the right to recover therefor; and if the injury is not actionable where committed, no cause of action can be carried to and asserted in another state: Baltimore etc. Ry. Co. v. Reed, 158 Ind. 25, 92 Am. St. Rep. 293; Brewster v. Chicago etc. Ry. Co., 114 Iowa, 144, 89 Am. St. Rep. 348; Alabama etc. Ry. Co. v. Carroll, 97 Ala. 126, 38 Am. St. Rep. 163.

MCDONALD v. MICHIGAN CENTRAL RAILROAD CO.

[132 Mich. 372, 98 N. W. 1041.]

MASTER AND SERVANT—Fellow-servants.—A railroad car inspector and a freight-car conductor are not fellow-servants. (p. 430.)

MASTER AND SERVANT—Fellow-servants.—Those employed by the master to provide, or to keep in repair, the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to one another fellow-servants. In such case the one whose duty it is to provide and look out for the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence. (p. 430.)

MASTER AND SERVANT—Negligence.—If a freight-car conductor, before starting his train, tests the brakes at each end of the cars in the usual and customary way, by setting them up and releasing them, and they work properly, and he is shortly after injured through the breaking of a brake chain containing a concealed defect, which it is the duty of the car inspector of the railroad company to keep in good repair, such car conductor is not guilty of negligence, nor has he violated a rule of the company requiring him to know that there are reliable brakes on his cars. (p. 433.)

O. E. Butterfield and Henry Russel, for the appellant.

De Vere Hall, for the appellee.

374 MOORE, J. The plaintiff recovered a judgment against the defendant for injuries received by him while in its employ. The case is brought here by writ of error.

The plaintiff was in charge of a freight train running from Grayling to Mackinaw City. Grayling is about half-way between Bay City and Mackinaw City. The defendant maintains a car repair-shop at Bay City. At Grayling it has a train-

master and four car inspectors or repairers. At Mackinaw City it has one car inspector or repairer. The inspectors or repairers at Mackinaw City and Grayling inspect the cars, and repair such broken or defective parts as they are able to with the appliances at hand, which are not sufficient to enable them to do any welding. If the repairs are of such a character as to require it, the cars are sent to the shop at Bay City.

While in charge of his train in September, 1901, as it approached the third or fourth station north from Grayling, the plaintiff attempted to set the brake upon the way-car. Something gave way. The plaintiff was thrown between the way-car and the car next front of it. The wheels of the way-car passed over him, injuring him severely. An examination after the injury showed that ³⁷⁵ the chain attached to the lower part of the brake-mast had before that parted, and been repaired by using a wire, which was supposed to have been hay wire. This wire gave way under the strain, and hence the accident. This accident occurred upon the second round trip of the way-car after it left the repair-shop at Bay City. It does not appear when or by whom the hay wire was used to repair the chain. It is claimed by defendant the car was in good repair when it left the shop at Bay City. This is not admitted by plaintiff. Mr. Trumley, the inspector at Grayling, who claims he inspected the car at that place, was a witness on the part of the defendant, and disclaimed all knowledge of the wire. The inspector from Mackinaw City was not produced as a witness.

Counsel for defendant say there are two questions presented by the record: 1. The liability of a railroad company to a freight conductor injured by the negligence of a car inspector, whose duty it was to inspect and repair the way-car; 2. The right of such a conductor to recover for injuries resulting from an unreliable brake upon a way-car, when, by a rule of the company, he was "required to know that there was a reliable brake" on the car before making use of it.

As to the first of these questions, the position of the defendant is shown by the following statements taken from the brief of counsel: "The duty of the company is: 1. To provide a reasonably safe place and reasonably safe appliances; 2. To use reasonable care to maintain place and appliances in a reasonably safe condition."

It is said the car was reasonably safe when it left the shop at Bay City. In regard to the duty of the company to main-

tain it in a reasonably safe condition, it is said: "It performs the duty by employing a competent servant to inspect and repair defects when they appear; and, before it can be held liable for injuries resulting from ³⁷⁶ defects arising in the course of operation, it must have notice, either actual or constructive, that the defect exists, or that the servant is not performing the work assigned to him with reasonable care. In other words, there must be evidence that the master is not exercising reasonable supervision over his servants to see that they perform their work with reasonable care. There is no delegation of duty. It is performance. It is an exercise of reasonable care to maintain the appliance in a reasonably safe condition."

Again: "The company furnishes this way-car to its Grayling-Mackinaw division. It has a number of employes who are to make use of the car, some to inspect it, some to ride upon it, and some to set its brakes. The man who is to inspect it fails in his work. The company has no means of knowing what moment an employe, hitherto trusty and reliable, will prove deficient. But it has exercised reasonable care to preserve the reasonably safe condition of this way-car while it is in use by the employes of that division, by employing competent men to inspect the car at the end of every trip. Unless the plaintiff is able to show that the company knew of the existence of the defect, or that it had existed for a sufficient length of time to impose upon the company the duty to know, he cannot recover. This is the full measure of the defendant's duty to the plaintiff in this case, and we submit it is not shown to have neglected that duty."

Counsel cite cases which it is claimed sustain this contention.

It is the claim of plaintiff that the duty resting on defendant is not discharged by furnishing safe cars in the first instance; that such duty of maintenance is a continuing one, which it discharges through the employment of inspectors and repairers, and that the latter must exercise reasonable watchfulness and care to maintain such cars in a reasonably safe condition; and that defendant is liable for any omission of duty in that regard on the part of such inspectors or repairers, where, as a proximate cause of such omission, injury results to plaintiff, as one using such car.

It must be conceded the authorities are not agreed, but ³⁷⁷ the principles involved are not new in this state. The diffi-

culty lies in the application of them to a given case. In *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423, 46 N. W. 111, Justice Cahill, speaking for the court, said: "The rule may now be considered settled in this state, as well as in most of the states, not only that a master is bound to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another so as to relieve him from personal responsibility: *Johnson v. Spear*, 76 Mich. 139, 15 Am. St. Rep. 298, 42 N. W. 1092; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *Brown v. Gilchrist*, 80 Mich. 56, 20 Am. St. Rep. 496, 45 N. W. 82.

"The duty of the master to his employé in this respect is clearly and well stated by Mr. Justice Morse in *Van Dusen v. Letellier*, just cited, at page 502: 'It is well settled by all the authorities that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade; no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants. Such person is an agent, and the rules of law applicable to principal and agent must apply.'

"This doctrine is also clearly stated by Justice Field in *Northern Pacific R. Co. v. Herbert*, 116 U. S. 650, 6 Sup. Ct. Rep. 594, 29 L. ed. 755, where the whole question is carefully discussed, and numerous authorities in New York, Massachusetts, Maine, and other states to the same effect discussed and approved. Four of the judges dissented from his opinion, upon the ground that the case was governed by a special statute in Dakota, but expressed no opinion as to the common-law liability of the defendant under the circumstances of that case.

"In 1 *Shearman and Redfield on Negligence*, fourth edition, sections 194, 204, this question is discussed and stated as follows:

"Sec. 194. The master also personally owes to his servants the duty of using ordinary care and diligence to provide for their use ²⁷⁸ in his service sound and safe materials, instruments, and accommodations, and such appliances as are reason-

ably calculated to insure their safety. He is also personally bound to inspect and examine all these things from time to time, and to use ordinary care and skill to discover and repair defects in them.'

"'Sec. 204. None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent so as to relieve him from personal responsibility. He may, and often must, delegate the performance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates in that particular capacity, to the same extent as if those acts were literally his own.'

"The doctrine of the text is ably supported by the citation of authorities."

This case is cited with approval in *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598. After quoting from the case cited and from the argument of counsel, the learned justice said: "But the ingenious reasoning of counsel fails to take account of an important limitation upon the rule which relieves a master from liability when a servant is injured through the fault of another. That doctrine was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow-servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence.

"In *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598, it was said: 'The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating ³⁷⁹ it. They are charged with a master's duty to his servant. They are employed in distinct and independent departments of service, and there is no diffi-

culty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require.' In *Northern Pacific R. Co. v. Herbert*, 116 U. S. 653, 6 Sup. Ct. Rep. 596, 29 L. ed. 755, Mr. Justice Field, speaking of the distinction that he found to exist between the providing of safe machinery and the business of handling and moving it, said: "The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it."

The case of *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598, was cited and quoted from in *Roux v. Blodgett etc. Lumber Co.*, 94 Mich. 607, 54 N. W. 492. The fact is well recognized that there is a difference between the duty of furnishing a safe place or safe appliance to the employé, and the duty of seeing that the place or appliance so furnished is properly used.

In *McDonald v. Michigan Cent. R. R. Co.*, 108 Mich. 7, 65 N. W. 597, Justice Montgomery, speaking for the majority of the court, said: "The duty which the master owes to provide a reasonably safe place to work, and machinery in a reasonably safe condition, is not discharged for all time by providing machinery or premises safe in the first instance: *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572. This duty cannot be discharged by providing for an inspection by a fellow-servant, for wherever the duty of inspection, for the purpose of ascertaining whether there be a necessity to repair, or whether the machinery is in safe condition, exists, it is the master's duty. The duty of diligence in maintaining the machinery in a reasonably safe condition necessarily involves the duty of the master to take such reasonable measures to inform himself from time to time of the condition of the machinery as common prudence dictates."

And such we understand is the law. See the many cases cited in the brief of counsel for the plaintiff.

We now come to the consideration of the second question: Does the enactment of rule 50 relieve the defendant ³⁸⁰ of liability? The material parts of the rule read as follows: "Conductors must know at all times that their train is provided with everything necessary to enable them to comply with the regulations of the road. They are required to know that there is a reliable brake on the rear car, and that a proper man is kept at it while the train is in motion."

It is the claim of defendant that the rule imposed upon the plaintiff the risk of all dangers discernible by a prudent inspection, and that the defect was easily discernible; counsel citing *Brennan v. Michigan Cent. R. R. Co.*, 93 Mich. 156, 53 N. W. 358; *Enright v. Toledo etc. Ry. Co.*, 93 Mich. 412, 53 N. W. 536; *Whalen v. Michigan Cent. R. R. Co.*, 114 Mich. 524, 72 N. W. 323; *Peppett v. Michigan Cent. R. R. Co.*, 119 Mich. 640, 78 N. W. 900. An examination of these cases will show they are easily distinguishable from the one at bar. In the first case plaintiff knew of the dangers which it was claimed constituted negligence, and he also violated a rule of the company of which he had notice, which forbade him to do the thing he did. In the second case the plaintiff was hurt because of the negligence of a fellow-servant who was violating the positive requirements of a rule. In the third case the plaintiff was violating the requirements of a positive rule. In the last case cited, the following is stated in the opinion of the court: "The following facts are established by the evidence: 1. That the engine was properly constructed; 2. That defendant had performed its full duty as to inspection; 3. It was the duty of the decedent, both after coming in and before going out, to inspect the engine, and, after coming in, to minute in a book, kept for that purpose, any repair needed. He did make such inspection, but reported nothing wrong. The wearing, if any there was, was easily discernible. He therefore assumed the risk of such defect."

It is hardly believable that, if the inspector at Grayling had made the inspection which it was his duty to ^{see} make, the defect in the chain would have escaped his observation. It would have been easy for the framer of the rule to have said, in so many words, that the conductor should inspect the brake, if the company intended to impose that duty upon him. The plaintiff testified that, before he started his train out in the morning, he tried the brakes at each end of the car in the usual and customary way, by setting them up and releasing them, and that they worked properly. It is manifest this was not such a severe test as the chain would be subjected to in an effort to stop a running train on a downgrade. It also appears that that portion of the brake-mast around which the chain winds was below the platform of the car, and, as the chain wound around it, the wire would be concealed. There is nothing in the record to show that plaintiff neglected any duty imposed upon him by the rule: See *Lake Shore etc. R.*

R. Co. v. Parker, 131 Ill. 557, 23 N. E. 237. The case was carefully tried and properly submitted to the jury.

Judgment is affirmed.

Hooker, C. J., Carpenter and Montgomery, JJ., concurred.

Grant, J., took no part in the decision.

Rules for Determining Who are Fellow-servants are stated in Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216; Kelly Island Lime etc. Co. v. Pachuta, 69 Ohio St. 462, 100 Am. St. Rep. 706; Grant v. Keystone Lumber Co., 119 Wis. 229, 100 Am. St. Rep. 883. The authorities are not entirely harmonious on the question whether a car inspector is a fellow-servant with employes on the train: See the monographic note to Nast v. Kern, 75 Am. St. Rep. 621-623. As to whether an employer can escape responsibility for defective appliances or unsafe places to work by delegating his duty in respect thereto to a fellow-servant, see Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710, and cases cited in the cross-reference note thereto.

CENTRAL SAVINGS BANK v. O'CONNOR.

[132 Mich. 578, 94 N. W. 11.]

BILLS AND NOTES—Conditional Delivery—Evidence.—It may be shown by parol evidence that a note, unconditional in terms, was conditionally delivered, and placed in the hands of the payee with the distinct understanding that it was not to be operative, or become a binding obligation, until the happening of some event. (p. 435.)

BILLS AND NOTES—Conditional Delivery—Evidence.—If a note for a certain amount, payable at a certain time, is delivered to the payee, to take effect presently as the obligation of the maker, parol evidence is not admissible to introduce conditions or modifications of its terms. (p. 435.)

BILLS AND NOTES—Conditional Delivery—Evidence to Avoid.—If a note is unconditional in its terms and delivered to the payee to take effect presently, evidence is not admissible to show a parol agreement that the note was to become void upon the happening of a certain contingency. (p. 435.)

BILLS AND NOTES—Failure of Consideration.—If a note indorsed by persons against whom it may be enforced, together with a chattel mortgage, is given as the consideration for another note, such consideration does not wholly fail, though the maker of the first note becomes bankrupt. (p. 436.)

JUDGMENTS Non Obstante Veredicto.—If there is no special verdict inconsistent with the general verdict, a judgment non obstante veredicto is erroneous. (p. 436.)

C. W. Casgrain and E. A. Fink, for the appellants.

Barbour & Rexford, for the appellee.

579 MONTGOMERY, J. This action is brought upon two promissory notes, aggregating fifteen hundred and twenty-three dollars and forty-seven cents, made by the defendant O'Connor and indorsed by the defendant Hammond. The notes bear date February 1, 1901. The plaintiff made its case by introducing them in evidence. The defendants then offered to show by a parol agreement made at the time said notes were executed, and which is set out in a notice under the general issue, in substance as follows: That the notes were given for the amount of a chattel mortgage which plaintiff held upon the property of the J. R. Pearson Company, which property defendant O'Connor had purchased; that the title to said notes never passed to said plaintiff; that the notes were delivered to plaintiff upon the clear and distinct understanding and condition, agreed to by said plaintiff, that in case the said J. R. Pearson Company should thereafter be forced into bankruptcy by any of its creditors, upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, said notes would thereupon, in the event of the happening of such contingency, become and be null and of no effect, and were not to be paid, and that it was upon said condition said notes were delivered to said plaintiff; and that it accepted and held, and still holds, them, and each of them.

The evidence of the defendants upon this subject, which is most favorable to the defense, is, in substance, this: That the notes were executed in consideration of the transfer by the plaintiff to the defendant of a chattel mortgage and accompanying note of the J. R. Pearson Company, which note was indorsed by J. R. Pearson, F. H. Crawford, and A. J. Franklin. Defendant testifies that, after the notes were signed and indorsed, he then said to Mr. Fox, plaintiff's representative: "These notes are delivered to you on the condition that if this concern is put in bankruptcy by reason of any of these creditors petitioning because of this chattel mortgage having been given, or an execution having been levied and the goods sold under the execution, which are both acts of bankruptcy, then the notes are to be null and void; and Mr. Fox says, 'That is my understanding of it, and I accept **580** them so'; and he says, 'You know that there is nothing going to be done about it.'"

On the trial of the case the court submitted the case to the jury upon the instruction that, if the claim set up by the defense was true, the plaintiff could not recover. The jury returned a verdict for the defendants. Afterward a motion for

a new trial or for the entry of a judgment non obstante veredicto was entered, and the court, after consideration, entered a judgment for the plaintiff non obstante veredicto. The defendants bring error.

The meritorious question is whether the defense set out in this notice is one which can be established by parol testimony. It is doubtless true, as contended by the appellants' counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered, that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event: *Brown v. St. Charles*, 66 Mich. 71, 32 N. W. 926; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698. On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of *Hyde v. Tenwinkel*, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. The same rule has been followed, one of the recent cases being *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483. We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more ⁵⁸¹ certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet in a certain contingency this sum should not be payable at all, and the notes be redelivered.

It is suggested, also, that there was a total failure of consideration. This cannot be held, for the reason that there was transferred to the defendant, in consideration for the notes, the chattel mortgage and promissory note of the J. R. Pearson

Company, which note had indorsers against whom it would be enforceable. There was no absolute and total failure of consideration, and no defense of partial consideration was noticed under the general issue.

We think, however, that the practice adopted in this case was mistaken. There is no verdict which supports the judgment entered non obstante veredicto. Had there been a special verdict inconsistent with the general verdict, such a judgment might have been proper.

We think the case should be reversed and remanded for a new trial. No costs will be awarded to either party on this hearing.

The other justices concurred.

Parol Evidence is admissible under some circumstances to show that a negotiable instrument was delivered conditionally: *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111; *McCormick Harvesting Machine Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839; note to *Bedell v. Herring*, 11 Am. St. Rep. 314-316. But see *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235; *Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305; *Bryan v. Duff*, 12 Wash. 233, 50 Am. St. Rep. 889.

ROBINSON v. UNITED STATES BENEVOLENT SOCIETY.

[132 Mich. 695, 94 N. W. 211.]

INSURANCE, ACCIDENT—Delivery of Policy.—If an accident insurance policy is sent by the insurer to a local agent to be by him delivered to the insured, such agent is not the agent of the insured so as to effect a valid contract of insurance different from, and inconsistent with, the one applied for. (p. 438.)

INSURANCE, ACCIDENT—Application Contract, When Complete.—If an application for accident insurance provides that the contract shall be complete when received at the insurer's office and accepted by its secretary, the application accompanied by the premium and their acceptance by the insurer forms the contract of insurance until the policy is issued and received. (p. 439.)

INSURANCE, ACCIDENT—Application and Policy Inconsistent Therewith.—If an application for accident insurance is received and accepted by the insurer, the applicant is not bound by a policy containing conditions inconsistent with such application, which is issued and sent to a local insurance agent for delivery, until such applicant has had an opportunity to ratify or waive such inconsistent provisions. (p. 440.)

NEGLIGENCE, CONTRIBUTORY.—Passengers on Vestibule Trains, the vestibule doors of which are open, are not guilty of con-

tributory negligence in passing from one car to another, unless they either know, or should know, that such vestibule doors are open. (pp. 440, 441.)

McKay & McKay, for the appellant.

Knight & McAllister, for the appellee.

GRANT, J. On Friday, June 29, 1900, one Samuel Robinson, Sr., made a written application to the defendant for an insurance policy. He resided at Charlotte, Michigan. The defendant's local agent at Charlotte was one Wilcox, who solicited the insurance and received the premium. Mr. Robinson was to start the following Monday morning, July 2d, for Kansas City, Missouri, and this application was made in contemplation of that journey. The material portions of the application read as follows:

"I hereby apply for insurance in the above-named society under classification AA, accident monthly indemnity, \$100; accidental death indemnity, \$1,000; loss of any two limbs or both eyes, \$1,000; loss of one limb, \$500; sick monthly indemnity after first week, \$60, covering sickness originating after three months continuous membership. This application to be based upon the following statements of facts, which I hereby warrant to be true and complete, and is subject to the conditions of the certificate, which I agree to accept, and make the monthly payment of \$3.00 on or before the first day of each month hereafter in advance. . . .

"In case of death by accident, my beneficiary shall be Rosa H. Robinson; relationship, wife; residence, Charlotte, Michigan. . . .

"I hereby agree that any statement made by me to the solicitor of this application, or by the solicitor to me, shall not bind the society unless written hereon; that this application shall not be binding upon the society ⁶⁰⁷ until accepted by the secretary; and that the certificate shall not be in force until actually issued from the office in Saginaw, Mich."

At the bottom of this application, and after Mr. Robinson's signature thereto, appears the following:

"Witnessed and recommended by F. L. Wilcox, agent.

"Send policy to F. L. Wilcox at Charlotte, Michigan."

Mr. Wilcox forwarded the application to the home office, and on it was written:

"Approved and accepted 12 M., June 30, 1900.

"Certificate Number 119,524.

"J. B. PITCHER,

"Secretary."

Mr. Wilcox received the policy from the home office on the morning of July 2d, but after Mr. Robinson had left on his journey, and then delivered it to Mr. Robinson's son, who at noon took it to his father's home, and left it on the sideboard. The policy contained the following provision, which is not found in the application: "If death shall result within three months from date of accident, and solely from accidental injuries, as specified in clause first hereof, received after this certificate has been in full force and effect, without delinquency, for three consecutive months immediately preceding the happening of such accident, the society will pay \$1,000 to Rosa H. Robinson (wife), if surviving, otherwise to the executors, administrators, or assigns of the assured."

Mr. Robinson took a vestibule train from Chicago to Kansas City on the evening of July 2d, and, while passing from his sleeper to the dining-car, was thrown from the train through one of the side vestibule doors which was open, and was killed. The evidence for the plaintiff showed that the night was very warm and dark, and that the side doors were left open. Plaintiff's original declaration was based on the policy. Her amended declaration was based on the application and acceptance. The court directed a verdict for the plaintiff.

1. Mr. Wilcox, the local agent of the defendant, was not the agent of Mr. Robinson in receiving the policy, so that it, differing from the terms of the application, became binding upon Mr. Robinson without the opportunity to know its contents and ratify the provisions which are inconsistent with the terms of the application. The policy was sent to Mr. Wilcox for delivery to Mr. Robinson. The former so understood, and immediately sought the latter in order to deliver it. Finding that he had gone, he delivered it to the son. The contention that under these circumstances the agent of the defendant became the agent of the insured in receiving the policy, so as to effect a valid policy different from the one applied for, finds no support in authority or reason. Even an express stipulation that the agent of the company shall be deemed the agent of the insured would not change the legal status: 16 Am. & Eng. Ency. of Law, 2d ed., 909, 910.

2. Defendant concedes a contract of insurance, and insists that it is found in the certificate or policy issued by it and sent

to its agent, Wilcox. Plaintiff insists that this certificate or policy differed from the application, and was not binding upon the deceased until he had notice of its provisions inconsistent with the application, and had expressly or impliedly ratified them, and that the application and its acceptance constitute the contract. The record discloses that this application was made in anticipation of a journey, to be commenced by Mr. Robinson three days thereafter. It was so understood by the agent. The premium was paid, forwarded, and received at the defendant's home office. The application expressly provides that the contract of insurance should be complete the moment that it (the application) was received at the company's office and accepted by its secretary. The application and its acceptance formed the contract until the ~~the~~ certificate or policy was issued and received in its stead. In insurance contracts of this character it is the duty of the company to act with reasonable promptness. Failing to reject within reasonable time, the law implies an acceptance. Mr. May states the rule as follows: "If an application sent on approval is actually accepted by the company at its home office, though no notice of acceptance is given to the insured, and afterward rejected only because the premises burned before a policy was made out, the company is bound": 1 May on Insurance, 4th ed., sec. 54c.

A similar case to this is that of Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986. The application contained the stipulation that it should not be binding upon the company until accepted by the secretary, and that the policy should not be in force until actually issued from the office. The premium, as in this case, was paid to the agent, but the agent did not remit it to the company. The applicant in that case, as in this, applied for insurance in contemplation of a journey. The insured met with an accident before the policy was delivered. The only difference between the facts of that case and this is that the agent falsely stated to the insured that he had heard from the company, and that his application had been accepted. The court said that the payment of the premium to the agent was the same as paid to the company, and that: "It could not lawfully retain the premium, and hold the application in abeyance. The retention of the premium and its failure to reject the application, its holding of it while it took time to adjust a matter of concern only to itself, were tantamount to an acceptance of the application of an agreement to issue the policy."

A party applied to the local agent of a fire insurance company for a policy on personal property, and the agent said he would write it and report it, but doubted whether the company would carry it. The agent did not write or report the risk. The property was destroyed by fire, and ⁷⁰⁰ it was held that the contract of insurance was effected: *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

An application for a policy of life insurance was made, and a receipt given by the agent, containing a stipulation that the company should not be liable until the policy was delivered to the applicant while in good health. The application was received, policy written, and sent to the company's agent for delivery, but was never delivered. The company was held liable upon the principle that the unconditional written acceptance of the application consummated the contract: *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88. See, also, *Continental Ins. Co. v. Haynes*, 10 Ky. Law Rep. 276; *Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 South. 707.

If it should be held that the sending of the certificate or policy to Wilcox, defendant's agent, was equivalent to delivery to the insured—and there are authorities which so hold—then the case comes within *Dailey v. Accident Assn.*, 102 Mich. 290, 57 N. W. 184, 26 L. R. A. 171. The duty of the defendant was to issue the policy in compliance with the terms of the application. If it chose to insert inconsistent provisions, it was its duty to call the attention of the insured to them, so that he might accept or refuse the policy. The insured has the right to assume that his policy will be in accordance with the terms of his application, and he cannot be bound by a different policy, until he has had the opportunity to ratify or waive the inconsistent provisions: See, also, *Gristock v. Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 634, and authorities there cited.

3. It is urged that Mr. Robinson was, under the undisputed facts, guilty of contributory negligence in passing from his car to the dining-car while the train was running at full speed. Counsel cite and rely upon *Sawtelle v. Railway Passenger Assur. Co.*, 15 Blatchf. 216, Fed. Cas. No. 12,392. The train in that case was not a vestibule train, and the deceased was either riding upon the platform or passing ⁷⁰¹ from one car to another. In a vestibule train there is no more danger in passing from one coach to another than in passing from one seat to another in the same car. Dining-cars are attached, and one of the pur-

poses of the vestibules is to make it safe for passengers to pass from car to car. Mr. Robinson had the right to assume that the vestibule doors were closed, and that it was safe for him to pass through. If the railroad company had removed these safeguards, it was incumbent upon defendant to show that Mr. Robinson either knew or should have known it. It failed to make any such showing. The railroad company had made the means of passage safe, and invited him to pass, and he was not negligent in accepting the invitation: *Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 740; *Marquette v. Chicago etc. R. R. Co.*, 33 Iowa, 562.

Judgment affirmed.

Moore, Carpenter, and Montgomery, JJ., concurred.

Hooker, C. J., did not sit.

Insurance Agents are generally, but not universally, held to represent the insurance company, and not the insured: See *Leonard v. State Mut. Life Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698; *O'Rourke v. Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, and cases cited in the cross-reference note thereto.

When an *Insurance Contract* is complete is the subject of a monographic note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 143-153. And see the subsequent case of *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

GIBSON v. CURRIER.

[83 Miss. 234, 35 South. 315.]

INFANT—Service of Process on Parent, Necessity for.—Under the Mississippi statutes, a judgment against an infant is void if the record fails to show that process for him has been served upon his father, mother, or guardian, or that he has neither in the state. (p. 446.)

INFANT—Service of Process on Parent, Sufficiency of.—A statute requiring process against an infant to be served on his father, mother, or guardian, is not complied with by service on a parent in his capacity as defendant only; where the parent is also a party defendant, he must be specially served for the infant in order to bring the latter before the court. (p. 450.)

LIMITATION OF ACTIONS—Purchaser at Judicial Sale.—The defense of the two year statute of limitations cannot be raised by a purchaser under a decree of court who makes no actual payment; no sham payment or subterfuge will do. (p. 450.)

R. P. Willing, Jr., for the appellants.

Robert B. Mayes, J. S. Sexton and Calvin Perkins, for the appellees.

246 WHITFIELD, C. J. This is a suit brought by Mrs. Tansey Gibson, Lora Jones and J. B. Jones, Jr., heirs at law of E. H. Jones, deceased, and Mrs. Kate L. Barlow, against Francis Smith, Caldwell & Co. and their trustee, C. C. Currier, seeking to perpetually enjoin a sale of the lands in controversy under a trust deed given by C. W. and N. E. Ford on January 11, 1890, to secure eight hundred dollars and interest, and also to have said trust deed canceled as a cloud upon the title of complainants. The facts are these:

On September 5, 1879, Mrs. Eliza Jones bought from Mrs. M. C. Matthews and husband about two thousand seven hundred acres of land in Copiah county for three thousand three hundred dollars, secured by vendor's lien. This tract included the land now in controversy. On September 10, 1880, Eliza Jones died intestate, leaving her husband, J. B. Jones, tenant by the curtesy, and Eugene H. Jones and Willie Jones, a minor, as her children and heirs. On November 25, 1882, Mrs. M. C. Matthews filed a bill to foreclose the vendor's lien reserved in her deed to Eliza Jones, making J. B. Jones, Eugene H. Jones and Willie Jones defendants thereto; this suit being numbered 1164 on the docket. Final decree ordering sale to satisfy amount due (i. e., three thousand eight hundred and fifty dollars) and cost was in time rendered, the lands were sold and bought in by M. C. Matthews for ²⁴⁷ two hundred and sixty-four dollars, in April, 1883, and this sale was in due time confirmed. On same day she conveyed all the lands to J. B. Jones, the husband of Eliza Jones, for three thousand eight hundred and fifty dollars. On the same day J. B. Jones conveyed to Mrs. N. E. Ford the land in controversy (seven hundred and twenty acres) for five thousand five hundred dollars (one thousand dollars cash, balance evidenced by promissory notes, and secured by vendor's lien, which notes were assigned to Matthews by Jones to secure Jones' notes to Matthews). On October 2, 1887, Willie Jones became twenty-one years of age, and on February 9, 1888, he appealed from the decree rendered against him in the foreclosure suit brought by M. C. Matthews against the heirs of Eliza Jones. The supreme court on May 21, 1888, reversed the case, because the record failed to show proper process for the minor, Willie Jones, or that the court had acquired jurisdiction over him. On October 10, 1888, Mrs. M. C. Matthews filed an amended bill in said original foreclosure suit (No. 1164) against same parties, reciting above facts, and further that Mrs. N. E. Ford had paid a large part of the purchase money for the seven hundred and twenty acres due by her to J. B. Jones, and by J. B. Jones assigned to Matthews, but that there was still three thousand one hundred dollars due on the Eliza Jones notes; that complainant did not seek to subject the Ford seven hundred and twenty acres (the land now in controversy), did not aver that the original process had been properly served as to the minor, Willie Jones, and did not ask to have the return thereon amended, but asked for a decree to

sell the other portion of the land. On May 15, 1889, another final decree was rendered against J. B. Jones, Eugene H. Jones and Willie Jones for the sum of three thousand nine hundred and seventy-one dollars and forty-eight cents, and the original tract, less the Ford seven hundred and twenty acres, ordered sold. On August 5, 1889, the lands described in the decree were sold, and M. C. Matthews became the purchaser, bidding therefor the sum of four thousand and thirty-eight dollars, and sale duly confirmed on November 14, 1889. This sale did not include the lands involved in this litigation.

Eugene H. Jones died intestate in 1889, leaving complainants, Tansey Gibson, Lora and J. B. Jones, Jr., as his heirs. J. B. Jones, the husband of Eliza Jones, died in April, 248 1899, thus terminating the estate by the curtesy. Willie Jones, in 1899, conveyed one-fourth of his one-half interest in the seven hundred and twenty acre tract to R. P. Willing, Jr., Willing conveyed to Kate L. Barlow, and afterward Willie Jones conveyed the remainder of his interest in said seven hundred and twenty acre tract to Kate L. Barlow, so that said Kate L. Barlow became the owner of all the interest of said Willie Jones in the land in controversy. On January 11, 1890, N. E. Ford executed a trust deed on land in litigation to secure indebtedness due Francis Smith, Caldwell & Co., which is still unpaid. On May 26, 1891, she executed a junior trust deed to secure certain indebtedness due H. H. Barlow. The land was sold by the trustee under this junior trust deed, and on September 20, 1897, H. H. Barlow became the purchaser at said trustee's sale. Later C. C. Currier, trustee, advertised the land for sale under the Smith, Caldwell & Co. trust deed, said sale to be made on March 19, 1900. The original bill of complaint herein was filed on March 14, 1900. At that date matters stood as follows: C. C. Currier, trustee for Francis Smith, Caldwell & Co., held trust deed on entire seven hundred and twenty acres from N. E. Ford. H. H. Barlow claimed entire tract as purchaser at foreclosure sale under junior trust deed executed by N. E. Ford. Tansey Gibson (sister of H. H. Barlow) and her two children claimed half interest in the land as heirs at law of Eugene H. Jones, deceased, and Kate L. Barlow (wife of H. H. Barlow) claimed half interest in the land as vendee of Willie Jones. The original bill of complaint made Currier, trustee, and Smith, Caldwell & Co., beneficiaries, defendants. An amended bill was filed, joining H. H. Barlow as

defendant. The bill set out the above facts, averred that the original decree in No. 1164 was void as to both Eugene H. Jones, the adult, and Willie Jones, the minor; that N. E. Ford only acquired the life estate of J. B. Jones in the land, and that estate had terminated by the death of J. B. Jones. The answer of Currier, trustee, and Smith, Caldwell & Co. admitted most of the facts, but denied the allegation of ownership by complainants; denied that the original ²⁴⁹ decree in No. 1,164 was void as to either Eugene H. Jones or Willie Jones; denied that N. E. Ford only acquired the life estate of J. B. Jones, but averred that, even if the decree in No. 1164 was voidable as to Eugene H. Jones or Willie Jones, one or both, still the said N. E. Ford acquired title in fee simple, for the reason that she purchased and paid for the land after the rendition of the original decree in No. 1164, and before appeal, in good faith, and without notice of any alleged defect in the process or decree, and that any right to proceed against her was barred by the statute of limitations of two years. The answer further denied that H. H. Barlow had title, because the sale to him was by collusion with N. E. Ford; that H. H. Barlow was the real complainant, and that he was estopped by his conduct with Smith, Caldwell & Co. to question the validity of their trust deed, and that Kate L. Barlow was also estopped, as being a party to her husband's fraud. Currier, trustee, and Smith, Caldwell & Co. also filed a cross-bill, asking for affirmative relief; averring that, notwithstanding the reversal of No. 1164 by the supreme court, the decree therein was in fact valid and binding on all parties, because, while it is true that the process for the minor, Willie Jones, was defective, it was a further fact that all the jurisdictional facts necessary to give the court jurisdiction of his person did in truth exist, even though they did not appear in the record of suit No. 1164. They asked to be permitted to show this, and to have the process in No. 1164 amended, and the decree declared valid and binding. Much proof was taken, and upon final hearing a decree was rendered dissolving the injunction as to the sale of the half interest of Eugene H. Jones in the land, and perpetually enjoining the sale under the trust deed to C. C. Currier, trustee, of the half interest of Willie Jones. Tansey Gibson, Lora Jones and J. B. Jones, Jr., appeal, and Currier trustee, and Francis Smith, Caldwell & Co. prosecute a cross-appeal.

This court decided in *J. P. Matthews v. J. B., Eugene H. and Joseph W. Jones* (Miss.), 4 South. 547, that the decree of

the chancery ²⁵⁰ court in No. 1164 (the original decree) was void as to the minor, Joe Willie Jones, because that court had not acquired jurisdiction over the minor, by reason of the failure to serve the process as required by law. Cooper, J., delivered the opinion of the court, which was as follows: "There is nothing in the record from which the court can find that the process for the infant, J. W. Jones, was served upon the father, mother or guardian, or that the infant had no father, mother or guardian in this state; and only upon such service, or upon its appearing that the infant had no father, mother or guardian in the state, could the court acquire jurisdiction over him by personal service only: Code 1880, sec. 1531 (1530); *Erwin v. Carson*, 54 Miss. 282. It may be that J. B. Jones, one of the defendants, is the father of the infant, but, in the absence of such fact of record, the court cannot assume it to be true. The final decree is of an inseparable character, and a reversal as to the infant necessitates a reversal as to all parties." And this was so held, and correctly held, though the bill in No. 1164 averred that Eliza Jones was dead, and that J. B. Jones was her husband, and that Joe Willie et al. were her heirs. There is no statement in all this that J. B. was the father, or Eliza the mother, or who were children, if any. It was not a merely erroneous decree. It was, as to the minor, Joe Willie Jones, absolutely void. It could not have been otherwise, since the court acquired no jurisdiction and service, as required by law, on the minor, was a condition of jurisdiction. That judgment of this court was the law of that case. It nowhere appeared in the record that the process for the minor, Joe Willie Jones, had been served on the father, or that he did not have a father living in this state. All parties so understood the decision, as shown by the statement in the amended bill filed when the cause was remanded. The statement is as follows: "No effort was ever made by the complainants to enforce this decree (the original decree), because, as hereinbefore shown, the reversal of the original decree obtained by M. C. and J. P. Matthews against J. B., E. H. and J. W. Jones, or William ²⁵¹ Jones, as he is described in said proceedings, rendered any effort to enforce the last obtained decree against J. B. Jones useless, and of no effect." And again the amended bill recites: "Complainants do not ask to subject said last described land"—the very seven hundred and twenty acres here involved. It may be noted, in passing, that the seven hundred and twenty acres here involved were deeded by J. B. Jones to Mrs. N. E.

Ford; that she gave a senior trust deed on this land to secure the appellees, and a junior one to secure H. H. Barlow, and that he foreclosed his trust deed, and that Mrs. Ford has now, and when this present litigation began, had no sort of an interest in the result of this suit. It may further be remarked that J. B. Jones' interest was not identical with, but antagonistic to, that of his minor son, Joe Willie Jones (he, the father, being tenant by the curtesy), and that he actually bought the lands at the sale under the original decree in No. 1164 for the very purpose of cutting out his children's title. And finally it may be said, in this view, that the evidence abundantly shows that the mortgage company's security on Eugene Jones' half interest will be more than sufficient to pay off its debt. Mrs. Ford, therefore, is not harmed, for she has no interest to be affected, and the creditor, mortgage company, is not harmed, because it is abundantly secured. These are observations by the way, however. We must determine the case according to law, in view of the settled rule that the chancery court must carefully protect infant's rights, no intendments against them being allowed.

In pursuance of this statement, as shown in the statement of facts given above, all effort by the complainant in that cause to subject the interest of said minor in the lands now in controversy was abandoned. Years afterward, when Mrs. Barlow had become the owner of this minor's interest aforesaid, this present bill was filed, and the answer thereto was made a cross-bill; and in this cross-bill the prayer is, in part, that at this late day the court, at the instance of those who were entire strangers to the original suit to foreclose, should allow these strangers to have the process amended so as to show that said minor, Joe Willie ²⁵³ Jones, did have a father, and that he was served with a copy on his own account, because of his interest as a defendant. The effort was not to have the amendment so made as to show that the process for the minor was served by handing a true copy to the father, as part of the service on the minor, but simply to show that one copy was handed to a person who was the father, that copy being handed to him as a defendant, and not as a part of the service on the minor—relying on *McIlvoy v. Alsop*, 45 Miss. 374. It does not appear that any further effort was made to have the court allow the amendment, save to so pray in the cross-bill. The court's attention was never again called to it by offer to make the proof or otherwise. But it is assigned for error, on this state of the record, that the court re-

fused to allow the amendment to be made. We think the action of the court was correct. There is a broad distinction between *McIlvoy v. Alsop*, 45 Miss. 373, and this case. In that case the bill averred that there was no guardian, and that the only surviving parents were the mothers; and the summons itself (45 Miss. 366) commanded the sheriff to serve "Mary A. Exum and her children, Kinchen W. Exum, Robert D. Exum, and E. W. Exum, and Lucy O. Exum and her children" (naming them); thus, on its face, showing that the minors there had mothers, and naming them Mary A. and Lucy Exum. It was therefore shown in that case, in two ways, by the record, that the minors there had mothers, and who those mothers were, and that they had no guardian or father: 1. The bills showed there were no guardians or fathers, and that Mary A. and Lucy were the mothers; and 2. The summons itself showed that they had mothers, who the mothers were, and that the mothers were co-defendants, and the return showed that the mothers were served by handing each one a copy on account of their own interest as defendants. In other words, the record there did somewhere show that there were no guardians for the two sets of minors, that both the fathers were dead, and who the mothers were, and that they were served as defendants, with a copy each. Here the record ²⁶³ nowhere shows that this minor, Willie Jones, had no guardian, nor that he had no father in this state, nor that his father and mother were dead, nor does it show that the father was served as such, either in the summons or in the return. And yet the fact is that his father was living, and that he was a codefendant, and that he had a copy handed to him by name, as codefendant, but it was not shown by process or return or anywhere that he was the father. It is perfectly obvious that this case is different from *McIlvoy v. Alsop*, 45 Miss. 374, in the particular being discussed. On the record, therefore, as it appeared to this court when the opinion was rendered by Cooper, J., it is clear that the decree was utterly void, and the lower court had no jurisdiction over the person of the minor, Willie J. Jones.

Counsel for appellants insist that whether the court had jurisdiction depended upon the fact of service, and not upon the recitation of that fact. If that was a correct statement, as an abstract legal proposition, it no way helps appellants. For the fact is here that the father was not served as a father, but simply as codefendant. Another fact is that nowhere was it shown that there was no guardian, no mother or father. The

amendment, to avail anything, must necessarily have gone far beyond the prayer for amendment, and have shown not only that the person served was the father, but also that there was no guardian in this state. In truth, the prayer was in effect, to amend the process, as well as the return. It was properly refused.

Before passing from this point, we call attention to the fact that the case of *McIlvoy v. Alsop*, 45 Miss. 374, has been clearly overruled by the case of *Erwin v. Carson*, 54 Miss. 284. So far as the holding in the former that it is enough, when serving a minor who has no father or guardian in the state, when the mother is a codefendant, to hand the minor a copy, and the mother a copy, not as mother, and part of service on the minor, but as a codefendant, the court, carelessly enough, observes that "it would have been an idle ceremony to have given the mother two copies." How can that which is a condition of jurisdiction ²⁵⁴ ever be "an idle ceremony"? If, as may often be the case, the interests of the minor and the mother are antagonistic, how is the peremptory mandate of the statute complied with by simply giving the mother—the surviving parent—a copy in his or her capacity as defendant only? In *Ingersoll v. Ingersoll*, 42 Miss., at page 162, that great common-law jurist, Peyton, J., speaking for the court, said: "The process that was served on Caroline Ingersoll should have also been served on her father, mother or guardian, if she had any in the state and, if not, that fact should be stated in the return, in order to justify the appointment of a guardian ad litem for her." In *Erwin v. Carson*, 54 Miss. 384, Campbell, J., said the court was asked to overrule *Ingersoll v. Ingersoll*. Instead of doing that, the court distinctly reaffirmed it, modifying it in the single respect that the sheriff should, in his return, set out that there was no father, etc., in the county, instead of in the state. But in all other respects *Ingersoll v. Ingersoll*, on mature consideration, and in meeting a direct assault upon it, was upheld and maintained. Campbell, J., says: "As the process for an infant is to be served on the father, mother or guardian, 'if he have any in the state,' and as such may be in his county, the sheriff should return that he has executed the process on the father, mother or guardian, or that there is none such in this county; and upon this return, if it shows no father, mother or guardian in that county, it may and should be shown to the court that the infant has no father, mother or guardian in any other county in this state,

and this fact should be recited in the decree for the appointment of a guardian ad litem. Until the process is executed on the father, mother or guardian, or it is made to appear that the infant has none in this state, the court cannot legally appoint a guardian ad litem for such infant, for service on the father, mother or guardian, if any in this state, is part of the required service on the infant." Note the expression "service on the father, mother or guardian, if any in this state, is part of the required service on the infant." This is squarely in conflict with the statement that one copy to the mother, as co-defendant, ²⁵⁵ is enough, in *McIlvoy v. Alsop*, 45 Miss. 374. The copy of the sheriff served on the mother in that case was given her in her capacity as defendant, and most emphatically not "as part of the required service on the minor." The whole of the service the statute requires on the minor, and not part of it, is necessary to give jurisdiction over the minor. The doctrine thus clearly announced by Campbell, J., is undoubtedly the true construction of the statute, and is in harmony with decisions elsewhere on the same statute: See 10 Encyclopedia of Pleading and Practice, pages 604, 607, pointing out that "where the person required to be served is also a party defendant," as here, he must be specially served for the infant, in order to bring the latter before the court, citing *Cook v. Rogers*, 64 Ala. 406; *Hodges v. Wise*, 16 Ala. 509; *Helms v. Chadbourne*, 45 Wis. 60, and other cases. We regard that part of *McIlvoy v. Alsop*, 45 Miss. 374, as overruled, therefore, by *Erwin v. Carson*, 54 Miss. 284, which was followed and approved in *Moody v. McDuff*, 58 Miss. 751.

There is nothing in the plea of the statute of limitations. The purchase money was not paid. Mrs. Matthews paid no purchase money, did not even credit her bid (two hundred and sixty-four dollars) on the decree, and did not take possession of the land. L. H. Matthews' testimony shows this. She conveyed to J. E. Jones the day of the purchase, taking his notes. He never paid anything. J. B. Jones on same day conveyed, for five thousand five hundred dollars, to Mrs. N. E. Ford, taking her notes. A decree was rendered January 7, 1888, for three thousand and ninety-seven dollars, amount of balance of vendor's lien, against J. B. Jones, but no effort was ever made to enforce it, because of the reversal of the original decree by the supreme court. The law is imperative in requiring actual payment. No subterfuge or sham payment will do.

Mrs. Barlow is not connected by any testimony with the facts which are claimed to estop her husband. We think there is no merit in the cross-appeal. So far as Mrs. Ford's good faith is concerned, she knew, through her attorneys, all that was in the record, or ought to have known; and, besides, this statute of limitations does not mean the good faith of a purchaser from a purchaser: *Jeffries v. Dowdle*, 61 Miss. 504.

Affirmed on appeal and cross-appeal.

Justice Calhoun Dissented, saying in part: "I hold that on the facts of this case the title of Mrs. Ford is to be treated precisely as if she had bid at the sale by the commissioner, and was unaffected by the reversal. Mrs. Matthews was the mere conduit through which title to part of the land was vested in Mrs. Ford, while title to the other party was vested in J. B. Jones, the father of E. H. and J. W. Jones, all in pursuance of a previous arrangement for that result; and I find no difficulty in treating the case as if Mrs. Ford had purchased at the sale by the commissioner, in which case, by the authorities generally, her title would have been unaffected by the subsequent reversal of the decree. This is not a case where there was no process served on the minor, J. W. Jones, in which case the decree would have been void as to him. He was served, and his father was served, and the court had jurisdiction of the subject matter and the person; but the record did not show the whole truth, in that it does not show anywhere the actual fact that J. B. Jones was the father of the minor. So I say the decree of the minor was not void, but voidable only, and the title of the innocent purchaser good: *Campbell v. Hays*, 41 Miss. 561; *Hanks v. Neal*, 44 Miss. 212; *Harrington v. Wofford*, 46 Miss. 51; *Christian v. O'Neal*, 46 Miss. 669; *Cocks v. Simmons*, 57 Miss. 183; *McLemore v. Chicago etc. Ry. Co.*, 58 Miss. 514; *Rigby v. Lefevre*, 58 Miss. 639. Whatever rights Mrs. Ford had to the whole property she bought went as security to cross-appellees under the first trust deed. It, of course, therefore gave the power to resort to the whole property, not half of it, to the extent of her rights, in satisfaction of the debt it secured. Now, it is not denied that Mrs. Ford was an innocent purchaser for value, with no actual notice of the technical defect in the sheriff's return upon a valid process, and one validly served, as a matter of fact. So, if Mrs. Ford had been the party attacked, and could successfully defend, if she had never executed any trust deed, it is plain that her grantee in her oldest trust deed can also successfully defend. That she could, I do not think a matter of doubt; the defect in the sheriff's return making the decree voidable, and not void, and a purchase under it, before appeal, being protected by what I regard the great weight of reason and authority. In this view, the junior trust deed and the action of the Barlows cut no figure in the case, and it is immaterial whether or not Mrs. Ford has any interest

in this litigation, or whether or not the security of the trust deed may be enough on one-half the seven hundred and twenty acres of land. The two year statute of limitations bars appellants and cross-appellees. The sale was in good faith, and the purchase money paid for the land bought by Mrs. Ford, and it was possessed by her. All the conditions prescribed by the beneficent statute (Code 1880, sec. 2693) exist, and no reason appears for failure to apply this statute to the part of the land purchased by Mrs. Ford. The fact that these conditions do not apply to the other part of the land sold under the decree of Mrs. Matthews is no reason for not applying the statute to the land conveyed to Mrs. Ford: *Summers v. Brady*, 56 Miss. 10. Payment of the purchase money to the complainant, Mrs. Matthews, is as good as if paid directly to the commissioners: *Natchez Ins. Co. v. Helm*, 13 Smedes & M. 183.

"I think this case should be affirmed on direct appeal, reversed on cross-appeal, and decree here dissolving the injunction in toto, dismissing the original and amended bills, and for one hundred dollars, the agreed attorney's fee on dissolution of the injunction, and all costs in this court and the court below to be taxed against appellants and cross-appellees."

For Authorities on the sufficiency of service of process on an infant and his parents or guardian, see the monographic note to Sanford v. Edwards, 61 Am. St. Rep. 492; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

KNUT v. NUTT.

[83 Miss. 365, 35 South. 686.]

UNITED STATES—Power of Attorney to Prosecute Claim Against.—An irrevocable power of attorney to prosecute a claim against the United States, executed before the allowance of the claim, is void under section 3477 of the Revised Statutes. (p. 455.)

UNITED STATES—Contract to Prosecute Claim Against.—A contract by an attorney to prosecute a claim against the United States "through any diplomatic negotiations" that may be deemed for the best interests of the client is not, because of the use therein of such words, void on its face. (p. 455.)

UNITED STATES—Prosecuting Claim Against for Part of Recovery.—An agreement by an attorney to prosecute a claim against the United States for "a sum equal to thirty-three and one-third per cent of the amount which may be allowed" thereon, is not within section 3477 of the Revised Statutes declaring that transfers of claims against the United States before their allowance shall be void. (p. 456.)

UNITED STATES—Lobbying—Recovery for Services.—It seems that an attorney who prosecutes a claim against the United

States for a percentage of the recovery, is not barred of his rights to participate in the fruits, after payment has been made, by having procured personal solicitations to be made to members of Congress in behalf of the claim. (p. 457.)

A contract was entered into between Julia Nutt, administrator of the estate of Haller Nutt, and an attorney named Denver, whereby the latter agreed to prosecute a claim against the United States for the use and deprivation of property during the Civil War. Thirteen years later, in 1887, this contract was transferred by Denver to appellant, Sargent P. Knut, who prosecuted the claim to a successful issue. Pending the prosecution, Mrs. Julia Nutt died and one Williams was appointed in her place, and he dying, appellee John K. Nutt was appointed to succeed him. As administrator, Nutt received the money. Knut brought suit for his percentage of the recovery as provided by the contract; and amended his bill, claiming that if he was not entitled to recover under the contract, he was entitled to reasonable compensation. From a decree denying his right to recover, he appealed.

Catchings & Catchings, for the appellant.

Reed & Brandon, Brown & Martin and J. A. Clinton, for the appellees.

§ 3477 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 2320), reads as follows (the italics being ours): "*All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorneys, orders or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof.*" Appellant Knut petitioned the chancery court to cause John K. Nutt, ^{administrator} the present administrator of the estate of Haller Nutt, deceased, to pay him thirty-three and one-third per cent of eighty-nine thousand nine hundred and ninety-three dollars and eighty-three cents, recently received by this administrator from the United States government, and his contingent fee for services as attorney at law under a written con-

tract, with which he is in privity, as assignee of it, made between one Denver and Julia A. Nutt, then executrix of Haller Nutt, on May 18, 1874. In an amended petition he asks that, if he be not entitled under the contract, he be allowed thirty thousand dollars as the reasonable value of his services. It is not to be disputed that, if Denver could have recovered, Knut can recover, this being the only contract. Mr. Knut exhibits with his petition two papers, each dated May 18, 1874, and each signed by the executrix. One puts in Denver's charge the claim of about one million dollars, and says: "To prosecute the same before any of the courts of the United States, and upon appeal to the supreme court of the United States, or before any of the departments of the government, or before the Congress of the United States, or before any officer, or commission or convention specially authorized to take cognizance of said claim, or *through any diplomatic negotiations as may be deemed best by him for the interests of the party of the second part*" (the executrix). (The italics are ours.) This paper then proceeds as follows (the italics being ours): "The party of the second part [the executrix] agrees to pay the party of the first part a *sum equal to thirty-three and one-third per cent of the amount which may be allowed on said claim, the payment of which is hereby made a lien upon said claim and upon any draft, money or evidence of indebtedness which may be paid or issued thereon.*" The other paper, signed by the executrix on the same day (May 18, 1874), is a power of attorney, irrevocable, and, in so far as pertinent, is as follows (the italics being ours): "For me and in my name, place and stead, to prosecute a certain claim," etc., "before any of the courts of the United States, and upon appeal to the supreme court of the United States, or before any departments of the government, or before the Congress of the United States, and upon appeal to the supreme court of the ³⁷¹ United States, or before any department of the government, or before any officer, or commissioner or convention specially authorized to take cognizance of said claim, or *through any diplomatic negotiations, and to collect the same . . . and to receipt and sign all vouchers and bonds of indemnity or appeal, and to endorse all drafts and vouchers in my name,*" etc. This latter paper is attested by two witnesses, but the execution of both was about twenty-five years before, and was not after the ascertainment and allowance of the claim and issuance of the warrant, as the statute requires, and so the power of attorney is void. However, it does not appear that

it was ever acted on, and the money was collected directly by the administrator. But because the power of attorney was void, it does not therefore follow that the contract in the first paper referred to, for the fee, was also void. The two are separable, and the one may stand while the other falls.

The first question for consideration is whether the contract is void on its face. Very clearly it is not, unless some special significance be attached to the words, "or through any diplomatic negotiations as may be deemed by him best for the interests of the party of the second part." What these words mean, no one connected with this litigation as counsel seems to know. Certainly this court does not know, but it cannot construe them to convey an illegal meaning. They may mean the mere diplomatic tact of courteous manner and bearing in dealing with objections in the dispositions of items of the claim, which would be the lawyer's duty. They may mean divers things, proper and improper, and so the meaning must be attached to them, on their face, which would be proper. "When a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted": 3 Am. & Eng. Ency. of Law, 1st ed., p. 869, note; *Clay v. Allen*, 63 Miss. 426; *Merrill v. Melchior*, 30 Miss. 516; *Wilkins v. Riley*, 47 Miss. 313. This question is therefore settled on general common-law principles, and by the express adjudication of our own courts. So we conclude, on the ³⁷² face of the contract, that the court below erred in so much of the final decree as pronounces it void as "violative of the United States statute laws."

The validity of this contract is in no way disturbed by the case of *Owens v. Wilkinson*, 30 Wash. Law Rep. 436. This case showed an agreement that the counsel should have an "interest in said claim equal to one-half of the total amount received at the date of the settlement of said claim by the accounting officers of the treasury," which is requested "to be paid to my said attorney." That contract was the assignment of an interest in the claim, in direct contravention of the statute. In the case now before us the agreement is to pay counsel "a sum equal to thirty-three and one-third per cent of the amount which may be allowed on said claim." The difference between "an interest in" and a sum "equal to" seems a thin distinction at first glance, but, when the reason for and language of the statute are considered, it becomes broad and obvious. The

government had no intent to interfere with the free transfer of interests in the affairs of men, except in cases where they interfered with the convenient dispatch of its own business. Its disbursing officers had been harassed by countless notices not to pay, and great numbers of writs of injunctions against paying, claimants, by parties claiming to be assignees of all or part of the money in the treasury for disbursements on private appropriations by congress. So it forbids "all transfers and assignments" of any claim, "or any part or share thereof," or "interest therein," and all "powers of attorney," etc., for "receiving payment, unless made after the issuance of the warrant for the payment thereof." It determined that it would deal with the original claimant only, and have easy bookkeeping. The distinction is aptly and well stated in the opinion in the case of *Owens v. Wilkinson*, above referred to, in the words on page 440 as follows: "For the distinction, though subtle, is well established—the one conveying an interest in the fund to be recovered; the other being merely a personal obligation, the extent of which is to be measured by the amount of recovery." Appellees here are not aided ³⁷³ by *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623. There the attorney filed his complaint in equity to enjoin the claimant from withdrawing his part of the money from the treasury. His bill is based on a contract that he "should receive twenty-five per cent of whatever sum Congress might allow"; and the attorney got payment suspended by the disbursing officers by injunction, and the money was in the treasury when the case was decided by the supreme court. The court held that the agreement carried on its face the assignment of an interest in the fund, in giving the attorney twenty-five per cent of whatever sum Congress might allow, and this was enough to decide the case against the attorney. But the court further found that the "contract," which is not set out in the record, "was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim." In another part of the opinion it said: "The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate," etc. In every case cited in that opinion the fact was that the original contract was in violation of the statute. The opinion, in treating of Child's claim, of a lien,

though none was provided for in the contract, disposes of it by very properly holding that the contract, being illegal, could not support a lien, and says: "The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated." It then shows the contract invalid, which, of course, destroyed any claim of lien as attorney in carrying it out, and then decides that the remedy, if any, was not in equity to enforce a lien, but at law for breach of the contract. There is no parallelism between that case and this at bar. If there was, we should follow in the conclusions we arrive at in this opinion, the mass of later decisions of the United States supreme court and of our own appellate court.

The decree of the court below in the case before us cannot ³⁷⁴ be sustained on the ground that appellant procured personal solicitations to be made to members of Congress in behalf of the claim. Complainant testifies that he did not, and one of the defendants, who is interested, swears generally that he did. The complainant having exhibited a valid contract, and proved legitimate services, the burden of proof was on defendants to show corruption. But aside from this, it is certain that Mr. Calvin Nutt, the only witness for defendants, gives simply his opinion of what were improper personal solicitations, and in no instance states the facts of the colloquium in any interview with any senator or representative so as to enable a court to judge of its propriety. But suppose there were improprieties of this nature committed in carrying out the valid contract, is it therefore settled that complainant is to have none of the fruits? The government, having paid the money, has no concern in it; and, on the facts here, we do not think defendants should have it all, free from the obligation to complainant. Our own court is committed to this doctrine: *Fewell v. American Surety Co.*, 80 Miss. 791, 92 Am. St. Rep. 625, 28 South. 755; *Howe v. Jolly*, 68 Miss. 324, 8 South. 513; *Gary v. Jacobson*, 55 Miss. 207, 30 Am. Rep. 514; *Walker v. Jeffries*, 45 Miss. 165; *Gilliam v. Brown*, 43 Miss. 659. See, also, *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808, which last case seems directly in point. Nearly all, if not all, these authorities, and many others, are cited in the brief of counsel for appellant, to which the profession is referred.

Reversed, and decree here that Sargent P. Knut is entitled to his prayer for thirty-three and one-third per centum of the

amount collected by the administrator (eighty-nine thousand nine hundred and ninety-three dollars and eighty-three cents), in full for any advances made by him, and all services rendered, and the cause is remanded for account to be taken accordingly, and for order that any balance of this per cent unpaid be paid to him by the administrator. Costs of both courts to be taxed on appellees.

On the Validity of Contracts by an attorney to prosecute claims against the United States, see the note to *Bowman v. Phillips*, 13 Am. St. Rep. 298, 299; and as to the validity of lobbying contracts, see *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608.

As to the Purpose of the Revised Statutes of the United States in restricting the right to assign claims against the United States, see *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625.

CLIFTON v. CLARK.

[83 Miss. 446, 36 South. 251.]

ATTORNEY—Contract with, Terminated by Death.—If, in a contract with an attorney, it is specially agreed or understood that he alone is to render the services, or that his skill exclusively is depended upon, his death terminates the contract, whether or not he is a member of a firm. (pp. 462, 463.)

ATTORNEY—Contract with, Terminated by Death.—If one contracts with a firm of attorneys for the services of both members, and one of them dies before the completion of the contract, the client may discharge the survivor, settling for services previously rendered. (p. 463.)

ATTORNEYS—Under a General Employment with a Firm of attorneys, either partner may attend to the business, and the client does not have the right to demand that any particular member of the firm shall render the services. (p. 464.)

ATTORNEYS—If One Member of a Firm of Attorneys Dies at a time when the firm has only partially fulfilled a contract of general employment with a client, it becomes the duty of the survivor to hold himself in readiness to perform the services called for, and the active functions of the partnership are continued until full performance by him. (p. 464.)

ATTORNEYS—If One Member of a Firm of Attorneys Dies at a time when the firm has only partially fulfilled a contract of general employment with a client, the representatives of the deceased are entitled to an equitable participation in the compensation accruing by reason of the subsequent performance of the contract by the survivor. (p. 466.)

ATTORNEYS—If One Member of a Firm of Attorneys Dies at a time when the firm has only partially fulfilled a contract of general employment with a client, a new contract between the survivor and the client will not defeat the claims of the estate of the deceased partner under the original agreement. (p. 466.)

McWillie & Thompson, for the appellants.

Green & Green and Anderson & Long, for the appellees.

⁴⁶⁰ **TRULY, J.** The bill of complaint in this case was filed by appellees, doing business under the name "Clark, Hood & Company," against the executors of the estate of J. A. Blair, deceased, to recover the sum of three hundred and ninety dollars and fifty-five cents on a claim duly probated against said estate, being balance due on open account by Blair at the date of his death. The executors filed a cross-bill claiming as an offset fees due by complainants to Blair for legal services rendered. To this cross-bill a demurrer was filed, which being ⁴⁶¹ overruled, answer was made and depositions taken on both sides. On final hearing the chancellor dismissed the cross-bill as not being sustained by proof, and granted a decree against the estate of Blair for the amount sued for. From that decree appellants, the executors of Blair, prosecuted this appeal. So far as material to the decision of the case the following are the undisputed facts disclosed by this record:

J. A. Blair and W. D. Anderson composed a firm of lawyers located in Tupelo, and doing business as counselors and attorneys at law and general practitioners throughout the state of Mississippi. Under the terms of their partnership contract J. A. Blair, the senior member of the firm, received three-fourths of all the fees, and W. D. Anderson, the other member, one-fourth. On September 5, 1895, Clark, Hood & Company, B. T. Clark & Co., and John Clark and B. T. Clark, as surviving partners of R. B. Clark & Co., entered into a written contract of employment with the legal firm of Blair & Anderson, whereby the said Blair & Anderson were employed to manage and conduct certain litigation then pending in which said Clark, Hood & Company, individually and as a firm, and the Clarks, also, as surviving partners, were interested. This litigation, to a large extent, consisted of claims pending against the estate of R. C. Clark, deceased, and certain other matters growing out of the administration of said estates. The consideration of the employment was that the said contracting parties agreed to pay Blair & Anderson a stated fee of twelve hundred dollars, and a contingent fee of twelve and a half per cent upon all sums which the said attorneys might succeed in having allowed by the court against the estate of R. C. Clark. The pending litigation proceeded for a period

of over three years, during more than two years of which time there was a continual taking of depositions in the case needed in the preparation of the same for a hearing before the auditors and the chancery court. During the year 1898 J. A. Blair, the senior member of the firm, being in feeble health, procured the services of W. H. Clifton, a practicing attorney, to ⁴⁶² assist him in the preparation and trial of the Clark estate matters, and Clifton did render material assistance. After the case was prepared for trial, but before it came on for final hearing, J. A. Blair died, in November, 1898. After the death of Blair appellees, Clark, Hood & Company, agreed that Clifton and Anderson, in conjunction with their other attorneys, should continue in the prosecution of the pending litigation, provided it would not cost the said Clark, Hood & Company any more money for lawyer's fees. This understanding was agreeable to both Clifton and Anderson, but in consideration of the fact that the death of Blair would entail more labor upon Anderson, the executors of Blair agreed that he, Anderson, should receive one-third of the contingent fee for which the Clarks and Hood had contracted, instead of one-fourth his interest as evidenced by the terms of the copartnership contract between Blair and Anderson. Subsequently, Clark, Hood & Company, on account of a disagreement with another of their lawyers, by which he refused certain additional services which Clark, Hood & Company demanded of him, without additional compensation, refused to abide by the understanding with Clifton and Anderson, and finally attempted, so far as related to the representatives of Blair, to terminate the contract relations which had existed between them and the firm of Blair & Anderson. Thereafter W. H. Clifton still tendered his services and held himself in readiness to discharge the duties of attorney and counselor at law in and through said litigation, but his services were declined.

On January 10th, after this attempt to abrogate the contract with Blair & Anderson, the Clarks and Hood made another contract with W. D. Anderson by which they employed him for the contingent fee of one-third of twelve and a half per cent of the amount which might be recovered, to proceed with the conducting of the litigation, for the managing of which they had contracted with Blair & Anderson, in the lifetime of Blair. The duties devolved upon Anderson by this new contract were identical ⁴⁶³ with those imposed upon him by the original contract made with Blair & Anderson, and the compensation was

the same agreed on between Anderson and the executors of Blair. After the execution of this new contract with Anderson the litigation proceeded under the management of Anderson and Robins, the other lawyer of Clark, Hood & Company, who had also been employed in the lifetime of Blair. The result of this new arrangement was that Clark, Hood & Company paid out for lawyer's fees a considerable amount less than they would have been required to pay had Blair lived, and the litigation been proceeded with under the existing contracts. After the final termination of the litigation, which resulted favorably to Clark, Hood & Company, the executors demanded Blair's portion of the contingent fee, which they claimed was due his estate under the contract with Blair & Anderson. This relief, as before stated, was denied by the chancellor, and forms the basis of this appeal.

It is urged by appellants that the chancellor misconceived the law applicable to the state of case made by this record, and that there are several different theories under which they are entitled to recover. It is said that the facts disclosed by the unsuppressed depositions show conclusively that during the lifetime of Blair it was agreed by all parties in interest that, on account of Blair's failing health, Clifton should be substituted in his place and stead, and that this was in effect the making of a new contract. Again it is said, that after Blair's death this agreement was ratified by appellees and Anderson and Clifton, as the substitute of Blair, were continued in charge of said litigation, and thereby appellees became bound to the estate of Blair for the amount of the contingent fee agreed on. Finally it is urged that as appellees continued Anderson in control of the business intrusted to his late firm, they are by their acts estopped from claiming that the contractual relations existing between themselves and Blair and Anderson were terminated by the death of Blair, and that this was the waiver of any rights ⁴⁰⁴ which they may have had of dissolving the relation of attorney and client.

The first two contentions are controverted by the appellees, and there is a sharp conflict in the testimony, and if these were the only questions involved in the case we would hesitate to disturb the finding of the chancellor upon the question of fact. It is manifest that, if Clifton was empowered by the clients to take Blair's place after Blair's death, or if they agreed to the substitution of Clifton in the place of Blair in his lifetime,

the question would be absolutely free of doubt, because then it would not be a question of the rights arising upon the dissolution of a partnership, but would be a plain, simple suit upon a contract made and entered into between parties still living.

The grave and important question involved in this litigation is presented by the remaining contention of appellants. The case here presented is that of a contract made between clients and a firm of attorneys, general practitioners, who agree to perform certain legal services for certain compensation, partly absolute, in part contingent on ultimate success. Upon death of one of the firm before a final termination of the litigation the survivor completes the services and conducts the litigation to its final and successful conclusion. What is the legal principle applicable to the case stated? The determination of this question necessitates the consideration of the relative rights and duties existing between attorney and client, and, as incidental to the main question, the duties and obligations imposed upon the survivor of the firm of attorneys.

The general rule in reference to contracts for special, personal services is accurately and clearly stated in the case of *Cox v. Martin*, 75 Miss. 238, 65 Am. St. Rep. 604, 21 South. 612, 36 L. R. A. 800, where it is said: "It is clear that wherever the continued existence of the particular person contracted with—the contract being executory—is essential to the completion of the contract by reason of his peculiar skill or taste, death terminates the contract; as, for example, contracts of authors to write books, of attorneys to render professional 405 services, of physicians to cure particular diseases, of teachers to instruct pupils, and of masters to teach apprentices a trade or calling." We adhere to this statement of the law in all cases to which it is applicable, but the case at bar is essentially different in its material facts from the case of *Cox v. Martin*. This is not a contract with any special attorney to render professional services; the continual existence of no particular person is essential to the completion of the contract; the successful consummation of the contract or the rendition of the services contracted for here does not depend upon the peculiar skill or tastes of any named individual; this is a joint contract with a firm of attorneys who are both general practitioners. We reiterate: Where a contract is made with an attorney, and it is specially contracted or understood that he, alone, is to do the work, or to render the services, or that his skill exclusively

is depended upon, and then the death of the attorney terminates the contract, whether he be alone or a member of a firm. And so where a client enters into a contract with a firm of attorneys for certain legal services to be rendered, for a fee stated, or upon an implied promise to pay the value of the services rendered, and contracts, as here, for the services of both members, and one of that firm dies before the contract is finally completed, the client then has the option of abrogating the contract entirely by discharging the survivor, settling for services previously rendered, and employing other counsel to conclude his pending litigation. This we understand to be the full extent of the decision of this court in *Dowd v. Troup*, 57 Miss. 206. It is there held that the client permitting the surviving partner to proceed with the services for which the firm had been previously fully paid, could not be called on to pay any additional compensation to the individual member who had in fact performed the services. That case does not pass on the question, nor is it presented for necessary decision here, as to what compensation, if any, the attorneys would be entitled to recover for services rendered previous to the dissolution should the client exercise his right of choice, and terminate the employment, ⁴⁶⁶ where the fee under the contract was entirely contingent upon success. We intimate no opinion on this point. But see as illustrative: *Wright v. McCampbell*, 75 Tex. 644, 13 S. W. 293; *Landa v. Shook*, 87 Tex. 609, 30 S. W. 536; *Badger v. Celler*, 41 App. Div. 599, 58 N. Y. Supp. 653; *Smith v. Hill*, 13 Ark. 174; *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 106.

The contract which shows the basis of the case at bar shows that the employment of Blair and Anderson was a joint employment of both members of the firm to render certain specified services and to manage and conduct certain matters then in litigation. This contract entitled the clients to the services of the firm, but was not a contract for the individual services of any named member of the firm. Either partner may attend to the business intrusted to a firm of attorneys, for the act of each is the act of all, and such a general contract does not give the client the right to demand that any particular member of the firm shall render the services or conduct the litigation: *Eggleston v. Boardman*, 37 Mich. 14; *Page v. Welcapt*, 81 Mass. (15 Gray) 536.

So that when one member of a firm of general practitioners, employed under such a contract dies, it becomes the duty of the

surviving partner to hold himself in readiness to perform the services required of the firm under the contract, and to complete the unfinished business for the benefit of the client. This doctrine is impliedly recognized in the case of *Dowd v. Troup*, 57 Miss. 206, where the surviving partner was denied extra compensation for services rendered after the death of his partner, and this conclusion can only be supported on the ground that the duty of completing the contract devolved on him as surviving partner. And it is there expressly stated that the surviving partner in rendering such services "was but discharging his own obligation as a member of the partnership."

Inasmuch as a general employment of a firm of attorneys is a joint employment of the members, and it is the duty of each to discharge the joint obligation, one member of the firm cannot, upon dissolution of the partnership, whether by death or otherwise, ⁴⁰⁷ refuse to carry to completion all executory contracts which were in force at the date of such dissolution: *Walker v. Goodrich*, 16 Ill. 341; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Johnson v. Bright*, 15 Ill. 464; *Smith v. Hill*, 13 Ark. 173.

With the possible limitation that they might be entitled to some additional compensation from the estate of his deceased partner for services rendered in winding up unfinished business, we see no reason why the general rule applicable to commercial partnerships should not apply to surviving partners of firms of attorneys. Having jointly undertaken the business intrusted to the partnership, each partner was under obligation to conduct it to the end; they owed this to the client and to each other. The very basis of every partnership is that there is "an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern": *Starr v. Case*, 23 Ind. 458; *Story on Partnership*, secs. 182, 331; *Denver v. Roane*, 99 U. S. 355, 25 L. ed. 476; *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731.

As to the executory contracts only partially fulfilled the death of one partner does not absolve the other from the duty of rendering the services contracted for, and the active functions of the partnership are continued in existence until full performance by the surviving partner. This principle is applicable to partnerships between attorneys as to executory contracts when the individual personal services of the deceased partner was

not especially contracted for: *Sterne v. Goep*, 20 Hun, 396; *Bates on Partnership*, sec. 711; *Denver v. Roane*, 99 U. S. 355, 25 L. ed. 476.

And in upholding the doctrine that this duty devolves on the surviving partner and is one of the risks and obligations assumed by him in the formation of the partnership, the supreme court of California in *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 106, says: "This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member leaving contracts not fully performed, often constituting a large part of the assets of the ⁴⁶⁸ partnership, and which it is the duty of the survivor as far as possible to complete and preserve for the benefit of the firm.

"While it is certainly true when a professional partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the goodwill of the partnership, or for the profits of such future business as may have been given to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, and which the client permits the surviving partner to complete, such contract of employment, although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership; and it is none the less an equitable asset, when, as in this case, the compensation for such services is entirely contingent upon the final success of the litigation in which the services are to be rendered."

In a class of cases beginning with *McGill v. McGill*, 2 Met. (Ky.) 258, it is stated as the general rule that the death of one of the firm of attorneys terminates the contract, but that the firm is entitled to compensation for services rendered during the continuance of the engagement, and the reason for the conclusion is thus stated: "A contract with a lawyer, the performance of which requires the exercise of professional skill, is personal in its character. The services of the person employed is indispensable in the performance of the contract. Lawyers are employed in professional business because the client has confidence in their integrity and in their qualifications." We have no fault to find with the language here employed in all cases where applicable. A contract with a pro-

fessional man for his individual services as pointed out in *Cox v. Martin*, 75 Miss. 238, 65 Am. St. Rep. 604, 21 South. 612, 36 L. R. A. 800, is always personal in the sense that it is terminable by death, and that performance of it cannot be demanded of his personal representatives, and it is also true that such a contract is terminated by death when the service of the person employed is indispensable in the performance ⁴⁶⁹ of the contract. But, as herein already pointed out, the service of no special person is "indispensable in the performance of the contract" in a contract, such as the one under review, with a firm of general practitioners contracted with as a firm and not as individuals. The *McGill* case ignores absolutely the duty and obligation of the surviving partner to the client and to the estate of his deceased partner. To our mind a very important and material consideration, and which must often vary the general rule so broadly stated in that case.

If, after dissolution of the partnership by death or otherwise, the estate of the retiring partner be liable for the tortious or negligent act of his late partner, in reference to partially fulfilled executory contracts as decided in the *McGill* case, *Wilkinson v. Griswold*, 12 Smedes & M. 669, and other cases, it would be illogical and inequitable to deny the representatives of the deceased partner an equitable participation in the compensation accruing by reason of the subsequent performance of such contracts by the surviving partner, and which the survivor was in duty bound to perform for the benefit of the firm.

From the foregoing it necessarily follows that the surviving partner could not of his own motion procure release from this duty or service and refuse to carry out to its ultimate completion, the work which had been intrusted to the firm before the death of his partner. Nor could the client, with the intent of defeating the claim of the estate of the deceased partner, re-employ the survivor of the law firm and thus, by making a new contract, have the benefit, without making compensation therefor of the services of the deceased partner, and by such contract only procure services to which he was already entitled.

Making a concrete application of these general principles to the case at bar, and waiving consideration of all disputed intentions, we find that after the death of Blair, appellees, Clark, Hood & Company, attempted to enter into a new contract with Anderson, the surviving partner, by which Anderson was retained in ⁴⁷⁰ their employ and conducted to a satis-

factory conclusion the litigation which had been intrusted to the firm of Blair & Anderson.

It is true that the employment of Blair & Anderson was a joint employment, and that by the death of one of the partners clients were deprived of his services, but this does not render them the less liable for the compensation agreed on, for the good and sufficient reason that one member of the firm did perform the services which the firm undertook to render, and, therefore, the contract was fulfilled. It is also true that the employment of Anderson was by another agreement made after the death of Blair, but equity and good conscience forbid the surviving party to abandon the business of the firm and contract to the detriment of the financial interest of his deceased partner's estate, even when, as in the present case, such action is dictated by an honest but erroneous conception of the law. Nor can the client thus avail himself of the services rendered by the deceased attorney in his lifetime, and then refuse to pay the compensation agreed upon, after, by reason of services, the litigation has been brought to a successful termination.

It may be that the surviving partner might have an equitable claim for a larger share of the compensation received for his services rendered after the death of his partner, but that question we are not called upon now to decide for the reason that the executors of Blair agreed with Anderson as to what his compensation should be, and that compensation, the record discloses, has already been received by Anderson, and it further appears that with eminent and commendable fairness and consideration, he expressly disclaims any interest in any fees which may be found due the estate of Blair by appellees. Clark, Hood & Company did not take advantage of the option of finally terminating the contractual relations which existed between themselves and Blair & Anderson, but contented themselves with allowing the surviving partner to remain in control of and conduct the business to its close, and this was a recognition and a continuance of ⁴⁷¹ their original contract, whereby they remain liable to the firm of Blair & Anderson for the full amount of the compensation originally agreed on, and as Anderson acknowledges receipt of his interest in that compensation, the remainder to be ascertained by calculations according to the terms of the contract, is now due the estate of Blair.

It is urged by appellees that viewing the services rendered by Blair & Anderson in the lifetime of Blair as a part performance of a contract, that then the estate of Blair is not

now entitled to further compensation, because upon quantum meruit the firm had been fully paid for all services rendered prior to the death of Blair. This reasoning is without force in the present case. The doctrine of quantum meruit can find no lodgment here. There was no partial performance of the contract in the instant case on which a quantum meruit could be based or calculated; the contract was fully complied with by the rendition of the required services by the surviving partner. The firm was not discharged and settled with up to date of dissolution, but through one member thereof made full performance of the contract. This contract provided for both an absolute and contingent fee; the absolute fee had been paid, the contingent fee depended upon the successful termination of the suit, all to be due if the suit was won, nothing to be due if the suit was lost. Therefore, the rights of Blair were not fixed until the termination of the litigation, and are now to be ascertained by a calculation upon the amount recovered as the fruits of the services rendered by Blair & Anderson, whether as a firm or individually.

It follows, therefore, that the decree of the chancellor denying the relief prayed for by the cross-bill of appellants was erroneous. Appellants, as executors of the estate of J. A. Blair, deceased, are entitled to recover the amount of the contingent fee due under the terms of the contract with Blair & Anderson, after first deducting therefrom the four and one-fourth per cent received by W. B. Anderson since the death of J. A. Blair. All parties necessary ⁴⁷² to a final determination and adjudication by a court of equity of the matters here involved are before the court.

The decree of the chancery court is reversed and the cause remanded for further proceedings in accordance herewith.

The Principal Case is supported by *Little v. Cadwell*, 101 Cal. 553, 40 Am. St. Rep. 89.

ILLINOIS CENTRAL RAILROAD COMPANY v. HARPER.

[83 Miss. 560, 35 South. 764.]

CARRIER—Expulsion of Passenger on Wrong Train.—If a railroad company has two routes to the destination of a passenger, and his ticket does not disclose which should be taken, the statements of the ticket agent and of a conductor that the passenger is on the right train are admissible in an action for her expulsion because on the wrong train. (p. 471.)

CARRIER.—A Passenger is not Bound by a Rule of the carrier, of which she has no knowledge, that passengers must go by direct route. (p. 473.)

CARRIER—Passenger on Wrong Train—Explanation.—It is the duty of a conductor about to expel a passenger because on the wrong train to listen to her reasonable explanation for being there. (p. 474.)

CARRIER—Expulsion of Passenger on Wrong Train.—If there are two routes to the destination of a passenger, and a conductor expels her for taking the wrong train, when she explains to him that the ticket agent and a previous conductor assured her that she has taken the right route and train, and her ticket discloses nothing to the contrary, the railroad company is liable in exemplary damages. (p. 474.)

CARRIER—Expulsion from Train—Exemplary Damages.—If a woman is expelled from a train in the night, notwithstanding her reasonable explanation, on the ground that she has taken the wrong route, it is none the less a willful wrong, entitling her to exemplary damages, because the conductor acts in a gentlemanly manner. (p. 474.)

CARRIER—Assisting Passenger in Right Car.—If a woman takes the wrong car of a train by direction of the ticket agent, it is not the duty of the conductor to place her in the right car, where he gives her proper information, the train is vestibuled, and she is not so sick as to require assistance. (p. 475.)

Mayes & Longstreet and J. M. Dickinson, for the appellant.

Brewer & Creekmore, for the appellee.

564 **WHITFIELD, C. J.** Mrs. Harper lived at Henderson, Kentucky; had been living there about eighteen months. Prior to that time she had lived at Water Valley, Mississippi. On the 24th of July, 1901, desiring to make a visit to Water Valley, she bought a ticket from Henderson, Kentucky, to Water Valley, Mississippi, from the ticket agent at Henderson. She had lived at Grenada, Mississippi, before she lived at Water Valley, and her husband and herself desired that she should go by way of Grenada, because she had acquaintances there. She says that she preferred that route, because she did not know where she would be delayed on the direct route by way of Jack-

son, Tennessee, in the night-time, and her husband and herself desired that she should go by way of Memphis, and stop over at Grenada. The agent told her that there was no difference in the price of tickets, and she took the Memphis route. The defendant company had two routes: One from Henderson, via Jackson, Tennessee, to Water Valley, called the direct route; but the local train ran over this route. The other route was from Henderson, Kentucky, via Princeton, Kentucky, to Memphis, Tennessee, and Grenada, Mississippi. Over this the fast train ran. When Mrs. Harper got to Princeton, Kentucky, she interviewed the ticket agent of the defendant company there, and he told her to take the Memphis train—positively told her not to take the other train. She accordingly took the Memphis train at Princeton. When the conductor of the train came around for tickets, she asked him if she was all right—if she could go by way of Memphis. He told her that certainly she could go that way, and honored her ticket, and carried her to Brighton, Tennessee, within one-half hour's run of Memphis. She was much nearer Water Valley at Brighton, going via Memphis, ~~was~~ than she would have been returning from Brighton to Fulton, Kentucky, and thence going to Water Valley. But at Brighton another conductor refused to pass her any further on that ticket, saying that the ticket was for the other route, and not good on that route, and that she would have to get off. It was then about 8:30 at night. Mrs. Harper fully explained to him all that had passed between her and the two ticket agents and the conductor. On this point she says: "I told him the man had sold me a ticket for that route, and all of the railroad officials had instructed me to go on that way and that I could not see why I could not; that I would get to Water Valley at 6:30 in the morning, and the other way would put me at Water Valley the day after; and that I had bought the ticket for that route. He put me off against my will; just willfully put me off. Of course, he did not take me bodily and put me off; but he told me I had to do it, and, of course, I did it. I went back to Fulton and spent the night." She further testifies that he positively refused to accept any explanation from her. She got to Fulton on the back train about 10 o'clock that night. She would have been in Memphis in another hour on the route she was on. She stayed in the hotel at Fulton until 5 o'clock the next morning. She knew no person at Brighton, Tennessee, and stayed at the depot there about twenty minutes, until the train going to Fulton came along. This was an accommodation pas-

senger train. At Fulton, Kentucky, the ticket agent, according to her testimony, which the jury believed, pointed out to her the train which he said was going to Water Valley, and also the very coach on the train which she should take to go to Water Valley. After the train had started, the conductor of this train which she was on told her she was on the wrong train, but that he would put her on the right train directly. She says that by this time she was almost desperate, that she was really sick from anxiety and worry, and that she notified the conductor that she was thus sick from anxiety and worry. She had really gotten on the car that went to Nashville, Tennessee, from Martin, Tennessee. The conductor failed to ^{see} keep his promise to put her in the right coach, and she was about to be carried from Nashville, Tennessee, from Martin; but she pulled the bell rope and stopped that train, and got off at Martin, and found herself about fifty yards from the train going to Water Valley, but it was just pulling out, and thus she got left, so far as that train was concerned. She went to a hotel so sick that she could not go to the dinner table and dinner was served in her room. She stayed at Martin all day, sick, and had to go to bed. She then took, at last, the right train, and reached her destination, after all this worry, vexation and delay—quite enough to make any woman traveling by herself thoroughly sick from anxiety and worry. She stated that the agent at Henderson told her expressly to go by Memphis, because she would make better connection that way, and that she went through Memphis, because she passed through Memphis in the night. She says that she had gone from Water Valley to Henderson by way of Memphis, buying her ticket at Water Valley via Grenada; that she had gone that way twice. She says that the conductor at Brighton was not insolent, but he was positive, and compelled her to get off. She further testifies that the circuitous route from Henderson to Water Valley was nevertheless the quickest route, by five hours, because over that route the fast train ran. She further says that the conductor on the train from Princeton told her that the Memphis route was the best route and that she remained on the train on his advice until they got to Brighton—nearly to Memphis. She says that both the conductor and the ticket agent at Brighton told her to take that route. The proof of actual damages in a small amount—some seventeen dollars—was made. The jury returned a verdict for the plaintiff for eight hundred and seventeen dollars.

The chief contention on the part of the appellant is that it was incompetent to admit the declarations of the two ticket agents at Henderson and Princeton, and of the conductor on the train from Princeton, Kentucky, to Brighton, Tennessee. This contention is unsound. The ticket, on its face, contained no information as to which route should be taken, nor did it advise appellee of the ⁵⁸⁷ rule of the company relied on here—that passengers on their trains must go by direct route. Mr. Justice Lamar, speaking for the United States supreme court, in *New York etc. Ry. Co. v. Winter*, 143 U. S. 69, 70, 12 Sup. Ct. Rep. 359, 36 L. ed. 78, 79, says: "The grounds upon which it is insisted that the evidence referred to was inadmissible are that the ticket itself, and the rules and regulations of the road with respect to stop-over checks, constitute the contract between the passenger and the road, and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket agent from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage, and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of conductors and other employes of railroad companies as to the internal affairs of the company, nor are they required to know them: *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544. In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket, or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanaca after stopping off at the former place. It is shown by the evidence that Olean was a station at which stop-over privileges were ⁵⁸⁸ allowed. Under such circumstances, it was entirely proper

for the passenger to make inquiries of the ticket agent, and to rely upon what the latter told him with respect to his stopping over at Olean: *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; *Palmer v. Charlotte etc. Ry. Co.*, 3 S. C. 580, 16 Am. Rep. 750; *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 299, 18 Am. Rep. 220; *Murdock v. Boston etc. Ry. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 136, 2 Am. St. Rep. 542, 8 Atl. 213."

This is decisive of two propositions: 1. That these declarations were competent; and 2. That this appellee was not bound by this alleged rule, of which she had no knowledge. It will be noted that this holding of the United States supreme court is squarely to the effect that the appellee would not have been bound by the rule unless information of it had been communicated to her, in any event. It is not necessary, however, in this case, on its facts to hold that the appellee should rely on this statement of the principle in its strictness, though we think the principle is just as stated by the United States supreme court. For here it is manifest that she did make inquiry of the ticket agent and of the conductor as to what route she should take, and the authorities cited by learned counsel for the appellant go no further than to hold that, where there is a rule such as here involved, it is the duty of the intending passenger to find out what route he should take, by inquiry, and that it is not the duty of the railroad company to bring home notice of this rule to such intending passenger, otherwise than in answer to inquiry. In the case of *Church v. Chicago etc. Ry. Co.*, 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616—which, it should be noted, was decided without any counsel appearing for the appellee, the passenger—the court reviews several authorities upon this particular question, as to which the editor, in the foot note, says: "Very few precedents exist." One of these authorities, relied on by appellant (*Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60), distinctly says: "The required information can always be had from the agent where the ticket is ~~was~~ purchased, and it is but reasonable to require passengers to obtain the information, and to act upon it." In *Cheney v. Boston etc. R. R. Co.*, 11 Met. (Mass.) 121, 45 Am. Dec. 190, speaking upon this point, the court says: "The plaintiff might have inquired and informed himself of that." This is precisely what this plaintiff did, and "the direful spring of the

woes unnumbered" which the plaintiff suffered was precisely the misinformation given her by the ticket agent. If it were a sound legal proposition that the company is not bound unless the plaintiff informs himself of the rule, still that condition was fully complied with in this case. Before passing from the Church case, we desire to say that the only erroneous information given in that case was given by a mere gatekeeper at the Milwaukee depot, whose sole duty, as pointed out at page 619, 26 L. R. A., was "to assist passengers in getting on the right trains." As stated: "He did not give her any misinformation. He simply did not advise her of the changes to be made at a junction five hundred miles distant." Mrs. Harper was not dealing with a gatekeeper. She dealt with the ticket agent, who was authorized to give the very information she sought. Other authorities showing the competency of the declarations of the ticket agent and conductor, if any are needed, may be found in the learned note to *Robinson v. Southern Pac. R. Co.*, 28 L. R. A. 775. It is also relied on and insisted by counsel for appellant that, as between the conductor and the passenger, it was not the duty of the conductor to listen to the explanation made by Mrs. Harper: *Kansas City etc. Ry. Co. v. Riley*, 68 Miss. 765, 24 Am. St. Rep. 309, 9 South. 443, 13 L. R. A. 38, and *Alabama etc. Ry. Co. v. Drummond*, 73 Miss. 813, 20 South. 7, are decisive of the unsoundness of this view. In the Drummond case the passenger simply protested; he did not make any explanation; and it was on this ground that the decision proceeded. It was not only the duty of the conductor to listen to this most reasonable explanation, but, having heard it, as he did, it was wrong—a willful wrong warranting the imposition of exemplary damages—to put this lady off the train under the circumstances. It is none the ⁵⁷⁰ less a willful wrong because he acted in a gentlemanly manner, and was guilty of no insolent conduct. She was subjected to the most grievous wrong, and she was intentionally subjected to it, after full disclosure of what had occurred between her and the ticket agent of the company. Plaintiff was clearly entitled to recover, under the first count in the declaration, not only the actual damages she sustained, but exemplary damages, and a verdict for a larger sum than here recovered would not have been disturbed by us. It is idle to argue that the conductor, flatly refusing to listen to the perfectly reasonable explanation made by this woman, and putting her off, under the circumstances de-

tailed in the evidence, at night, was not guilty of such intentional and oppressive wrongdoing as to warrant the imposition of punitive damages. It may as well be understood, once for all, that this court proposes to stand by the doctrine announced in the Drummond and Riley cases, as the just and true doctrine. But the difficulty in this case is that the plaintiff only asked for actual damages under the first count, when she was entitled to punitive damages, and yet asked and obtained an instruction for punitive damages under the second count, under which it is clear that she was entitled to no damages at all. Under the well-settled decisions of this court, it was not the duty of the conductor to place Mrs. Harper in the right car, and the mistake of the ticket agent at Fulton was corrected by the proper information given by the conductor. Mrs. Harper had nothing to do except to get up from her seat and walk forward through the vestibule train to the Water Valley car. She was not sick to such a degree as to require the assistance of the conductor. It follows that the fifth and seventh instructions for the plaintiff, to the effect that she was entitled to exemplary damages, are erroneous. In this curious attitude of the case, reversal must necessarily follow, for we must indulge the presumption that the jury did their duty, and obeyed the instructions of the court, which did not allow them to find anything but actual damages under the first count, but which did allow them to find exemplary damages under the second count. ⁵⁷¹ The verdict cannot, under the instructions, be referred to the first count, since the actual damages were only about seventeen dollars. It is obvious that it must be referred to the second count, under which no recovery at all could have been allowed. What we have said indicates the proper disposition of the case on a second trial, it being only necessary to add that the modification of the second instruction given for the defendant was necessary to a correct statement of the law.

Reversed and remanded.

Where a Passenger is aboard the cars of a carrier without the proper evidence of his right of passage, due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in respect to the ticket in dispute: *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, and see the cases cited in the cross-reference note thereto.

A Railway Ticket, according to *Ames v. Southern Pac. Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, is not so far conclusive of the right

of passage thereon as to make inadmissible representations made by the agent at the time of its purchase which are not in conflict with its express terms. Compare *Illinois Cent. R. R. Co. v. Harris*, 81 Miss. 208, 95 Am. St. Rep. 466.

Notice of the Rules of a Carrier must ordinarily be brought home to a passenger before he is affected thereby: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510; *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859. Compare *Barker v. Central Park etc. R. R. Co.*, 151 N. Y. 257, 56 Am. St. Rep. 626.

CRAWFORD v. MOBILE, JACKSON AND KANSAS CITY RAILROAD COMPANY.

[83 Miss. 708, 36 South. 82.]

EQUITY—Prevention of Multiplicity of Suits.—If a large number of the inhabitants of a city are induced to give their promissory notes on the fraudulent representation by a railroad company that unless the notes are given its road will not be built to the city, but to a rival town, equity, in order to prevent a multiplicity of suits, will enjoin the delivery of the notes by one holding them in escrow, and restrain their transfer by the payee, and decree their surrender and cancellation. (p. 477.)

EQUITY—Cancellation of Fraudulent Notes.—If promissory notes are obtained by a railroad company from the inhabitants of a city on the fraudulent representation that unless the notes are given the road will not be built to the city, but to a rival town, equity will decree their surrender and cancellation. (p. 477.)

Bill for the cancellation of promissory notes, and an injunction against their delivery by one holding them in escrow, and their transfer by the payee. The notes were given by fifty-seven inhabitants of a city on the representation by a railroad company that unless the notes were given its road would not be built to the city but to a rival town, when in fact it was the intention of the company to construct its main line to the rival town and a branch to the city, the contract for building such branch being already let. From a decree dissolving the injunction, the complainants appealed.

Green & Green, N. C. Hill and S. E. Travis, for the appellants.

McIntosh & Rich and Ellis & Sullivan, for the appellees.

716 **WHITFIELD, C. J.** There was no answer denying the fraud charged in the bill. The chancellor dissolved the injunction upon the theory, manifestly, that equity has no juris-

diction to try the case made by ⁷¹⁷ the bill. The equitable jurisdiction to grant the relief prayed for in the bill, on the sole ground that it would prevent multiplicity of suits, all the different notes depending upon "a common state of facts and a common principle of law," is clearly established by *Pollock v. Okolona Sav. Inst.*, 61 Miss. 296, and *Illinois Cent. R. R. Co. v. Garrison*, 81 Miss. 263, 95 Am. St. Rep. 469, 32 South. 996.

Fifty-seven different persons joined in executing notes for the amount of thirty-five thousand dollars, the execution of the notes growing out of the same transaction, and their validity depending upon the same identical principles of law. We quoted and approved in *Illinois Cent. R. R. Co. v. Garrison*, 81 Miss. 263, 95 Am. St. Rep. 469, 32 South. 996, the language of the court, through Chalmers, J., in *Pollock v. Okolona Sav. Inst.*, 61 Miss. 296, and we now again reaffirm the doctrine announced at page 296 in *Pollock v. Okolona Sav. Inst.* We think the doctrine announced by *Pomeroy* is sound, and clearly established by the best considered modern cases. But apart from this, the makers of these notes had the right to have them delivered up and canceled if they had been procured by fraud, as alleged in the bill. It is perfectly clear that these complainants had the right to have these notes delivered up and canceled, so as to avoid any possible future trouble, and that no adequate remedy existed at law. The case made by this bill is one which calls peculiarly for the exercise of the appropriate equitable jurisdiction.

The decree is reversed, the injunction reinstated, and the cause remanded for further proceedings in accordance with this opinion.

The Jurisdiction of Equity to issue an injunction to prevent a multiplicity of suits is discussed in *Illinois Cent. R. R. Co. v. Garrison*, 81 Miss. 257, 95 Am. St. Rep. 469, and cases cited in the cross-reference note thereto. As to the jurisdiction of equity to cancel instruments on the ground of fraud, see *Pratt Land etc. Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35; *Byrd v. Byrd*, 95 Tenn. 364, 49 Am. St. Rep. 932; and as to the cancellation of negotiable instruments, see *Fitzmaurice v. Mosier*, 116 Ind. 363, 9 Am. St. Rep. 854. The remedy by cancellation has been refused where the legal remedy is adequate: *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

COLUMBIA BANK v. BIRKETT.

[174 N. Y. 112, 66 N. E. 652.]

BANKRUPTCY, Effect of Discharge as Against Creditors Having No Notice of the Proceedings and not Named in the Schedule.— If voluntary bankrupts, who have executed a promissory note which they know has been transferred to another, insert in their schedules the name of the payee, instead of that of the holder, and the latter has no notice of the bankruptcy proceedings until after a discharge is entered, it is ineffective as against his claim, though he had notice of the discharge within seven months after its entry, and could therefore have proved his claim against the estate in the bankruptcy proceedings. (p. 481.)

Action upon a promissory note payable to the Manchester Railway Advertising Company, dated February 12, 1899, and transferred to the plaintiff before maturity. The defendant pleaded a discharge in bankruptcy entered September 12, 1899, but the evidence showed, and the trial court found, that the bankrupts, though they had notice of the transfer of the note when they filed their schedules in bankruptcy, inserted therein the name of the payee and not that of the plaintiff, and that it had no notice of the bankruptcy proceedings until after the entry of the discharge. Judgment in favor of the plaintiff was affirmed by the appellate division of the supreme court in the first judicial department, and the defendant thereupon appealed to the court of appeals.

J. Murray Downs and Thomas Carmody, for the appellant.

Julius J. Frank and I. S. Isaacs, for the respondent.

114 GRAY, J. The appellant does not dispute that the findings of fact are supported by the evidence, but he does dispute that they support the legal conclusion. Indeed, the evidence upon which the finding as to the defendant's knowledge of plaintiff's ownership and holding of the note is based leaves no doubt possible as to that fact. The note was due April 5, 1899. On March 27, 1899, in response to a request of ¹¹⁵ the defendant's firm for an extension of their note, its payee, the advertising company, informed them that it was held by the plaintiff, whose president refused to give any extension. Thereupon, and on April 4th, the firm wrote to plaintiff that, if it would hold their note "due at your bank tomorrow . . . until the 12th instant, we will endeavor to pay the same." Their petition in bankruptcy was filed April 13th, and in their schedule of creditors they inserted, under the heading of "Names of Creditors and Last Holders Known to Debtors," the payee named in the note, and not the plaintiff. In the following September they obtained the decree discharging them from their debts. In the following November the plaintiff's president wrote to the president of a bank in Penn Yan, New York, making inquiry about the firm of Russell & Birkett, and "what condition their affairs are in." Upon hearing, in reply, that they had "been through bankruptcy," plaintiff's president asked "in which district Russell & Birkett passed through bankruptcy, as we are not aware, and never received notification, that any such proceedings had taken place." He then learned that the proceedings were in the northern district of New York. However, singular those facts, we are not further concerned with them, as we are not assuming in this action that the defendant was guilty of fraud in procuring his discharge in bankruptcy. The contention of the defendant is that, notwithstanding the facts, his discharge is a perfect defense to this action, and that involves a construction of the present federal bankruptcy act, which was passed in 1898. Section 17 of that act provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice, or actual knowledge of the proceedings in bankruptcy," etc. The argument is made that, although the plaintiff had no notice or actual knowledge of the bankruptcy proceedings prior to the discharge, by subdivision "n" of section 57 claims may be

proven within a year after the adjudication in ¹¹⁶ bankruptcy, and when, in November, 1899, following the defendant's discharge, the plaintiff learned of that fact, that it had still five months left to make proof of its claim. Then reference is made to section 15 of the act, whose provisions allow a discharge to be revoked, upon the application of parties in interest, filed within a year from the discharge, for fraud of the bankrupt, etc.; and from these provisions of the federal statute it is inferred, and it is insisted, that no substantial rights of the plaintiff have been affected, and that, within the intent of the act, it was bound by the decree in bankruptcy, and its claim is barred.

While there may be some difficulty in the way of the statutory construction, I think the plaintiff's claim has never been discharged, as the result of the bankruptcy proceedings. In my opinion, there are features in the present bankruptcy act which differentiate it from preceding acts, and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy. It is provided that the voluntary bankrupt must file "a list of his creditors, showing their residences, if known," and that notices must be sent to the creditors at "their respective addresses as they appear in the list of creditors of the bankrupt, or as afterward filed . . . by the creditors." Section 58a and section 7, subdivision 8. While in the previous acts of 1841 and of 1867 substituted service of notices by publication was provided for, in the present act it is actual notice that is required to be given. The schedule of debts which the bankrupt is to file with his petition furnishes the basis for the notices which the referee or the court is to give thereafter to the creditors, and thus the bankrupt appears to be made responsible for the correctness of the list of his creditors. That he is to suffer in the case of his failure to state the name of the creditor to whom his debt is due, if known to him, seems to me very clear from the reading of section 17 of the act. That excepts from the release of the discharge all debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor." ¹¹⁷ That is very emphatic language, and how is it possible to obviate its effect by the argument that the plaintiff still had time left, after the discharge was granted, to prove his claim? The excepting clause of the act excludes from the bankrupt's discharge debts which "have not been duly scheduled in time for proof," etc. Can we say that such

debts as may be proved within a year from the adjudication in bankruptcy are discharged? I think, clearly, not. The present act, differing in such respects from the preceding acts, requires strict notification of the various steps in the bankruptcy proceedings to be given to the creditors of the voluntary bankrupt, according to his schedule, and it excepts from the release of the bankrupt's discharge provable debts which had not been duly scheduled, etc. I think it was intended that the decree discharging the voluntary bankrupt should be confined in its operations to the creditors, who had been duly listed, and who were enabled to receive the notices which the act provides for.

Nor can I agree with the suggestion that is made that plaintiff's substantial rights were not affected. Whether that is a necessary factor in the case, I do not say; but they certainly were, in my opinion. The plaintiff enjoyed none of the opportunities provided by the act for the creditors of a debtor who is seeking a discharge from his debts—such as the selection of a trustee, or the examination of the bankrupt, as preliminary to opposition to the discharge. Those were rights accorded by the act, and I am quite unable to perceive how it can be held that the plaintiff could be deprived of them, and remitted for all remedy to an attack upon the decree of discharge.

For these reasons, I advise the affirmative of the judgment, with costs.

From the Opinion of the Court Justice Vann Dissented. A writ of error was subsequently prosecuted to the supreme court of the United States, which affirmed the judgment of the court of appeals of New York: *Birkett v. Columbia Bank*, 195 U. S. 345, 25 Sup. Ct. Rep. 38. The opinion delivered by Mr. Justice McKenna was as follows:

“This is an action on a promissory note for seven hundred and fifty dollars. The defense is discharge in bankruptcy. The making of the note was admitted, and the only question presented is the effect of the discharge.

“The facts as found by the court are: Plaintiff in error and one Calvin Russell, who died before the commencement of this action, were partners, doing business under the name of Russell & Birkett, and in that name made and delivered to the Manhattan Railway Advertising Company a promissory note for seven hundred and fifty dollars. The latter company indorsed the note to defendant in error, of which Russell & Birkett had knowledge before its maturity. On the 13th of April, 1899, the firm of Russell & Birkett and plain-

tiff in error, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and were discharged September 12, 1899. The claim of defendant in error was not scheduled, either as a debt of the firm or of plaintiff in error, in time for proof and allowance with the name of the defendant in error, though defendant in error was known, at the time of filing the schedules, to be the owner and holder thereof by plaintiff in error, and that defendant in error had no notice or actual knowledge or other knowledge of the proceedings in bankruptcy prior to the discharge of the bankrupts. No notice of the proceedings in bankruptcy was at any time given to defendant in error by, or by the direction of, the bankrupts or either of them. It was decided that the claim of defendant in error was not barred by the discharge in bankruptcy, and judgment was directed for defendant in error.

"The judgment was successively confirmed by the appellate division of the supreme court and the court of appeals: *Columbia Bank v. Birkett*, 174 N. Y. 112, ante, page 478, 66 N. E. 652. Thereupon judgment was entered in the supreme court, in accordance with the direction of the court of appeals. This writ of error was then sued out.

"Section 7 of the bankrupt law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property, and creditors. Among his duties he is required to 'prepare, make oath to, and file in court, within ten days . . . a schedule of his property showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.' To the neglect of this duty the law attaches a punitive consequence. Section 17 provides: 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy': 30 *Stats. at Large*, 548, 550, c. 541; *U. S. Comp. Stats.* 1901, pp. 3424, 3428.

"But plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that Congress contemplated that there might be an intentional or inadvertent omission of the names of creditors from the schedule of debts, and provided against it by other provisions of the law; especially by that which makes it the duty of the referee to give notice to creditors (section 38), and by that which imposes the duty on the bankrupt to appear at the meeting of creditors, for examination.

"The finding of the trial court is that defendant 'had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein.' This is made more definite as to time by the court of appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about Russell & Birkett, was informed that they had gone through bankruptcy; and subsequently (November 17th) the northern district was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (section 65), and to move to revoke the discharge of the bankrupt (section 15). It is hence argued that defendant in error must be held to have had 'actual knowledge of the proceedings in bankruptcy,' as those words of section 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends (section 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding, without penalty to him. It is easy to see what results such looseness would permit—what preference could be accomplished and covered by it.

"Judgment affirmed."

For Other Recent Decisions under the bankruptcy act, see *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233; *Tatman v. Humphrey*, 184 Mass. 361, 100 Am. St. Rep. 562; *Fleming v. Courtney*, 98 Me. 401, 99 Am. St. Rep. 414; *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 606; *Colwell v. Tinker*, 169 N. Y. 531, 98 Am. St. Rep. 587, and cases cited in the cross-reference note thereto.

LORD v. HULL

[178 N. Y. 9, 70 N. E. 69.]

PARTNERSHIP, Equity Jurisdiction Over.—The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, nor except with a view to dissolve the corporation and, by a final decree, to adjust its affairs. (p. 485.)

PARTNERSHIP.—A Suit by One Partner Against Another will not be Sustained where there is no dissolution of the firm and no occasion for its dissolution, and the only matter of difference between them respects the existence and validity of a contract with a third person and the right to apply certain moneys in accordance with the terms of such contract. (p. 488.)

PARTNERSHIP.—A Court of Equity will not Take Cognizance of a Suit for an Accounting as a mere incident to a settlement of a solitary matter in dispute between partners, when it is not vital to either party nor to the business, and a dissolution is not sought. (p. 491.)

PARTNERSHIP—Intrusion of a Third Party in a Suit for an Accounting.—Where a suit for an accounting is brought by one partner against another because they differ as to the claims of a third person upon the firm under a contract between him and it, he has an adequate remedy at law and cannot gain anything by being made a party defendant and setting up his claims. The suit, not being maintainable as between the parties, must be dismissed, both as to them and as to the third person. (p. 491.)

Suit brought by Austin W. Lord and others against Washington Hull alleging that the plaintiffs and the defendant are partners; that an agreement was, on February 18, 1896, entered into with K. M. Murchison, providing for the payment to him of ten per cent of the gross commissions for work on the residence of William A. Clark, which work was not yet completed; that a disagreement had arisen between the plaintiffs and the defendant respecting the obligations of the firm to Murchison under the agreement; that the defendant had withheld a sum specified which was in excess of the sum which he was entitled to withdraw, and he threatened to withdraw from time to time such further sums as he believed himself entitled to; that the plaintiffs did not desire to dissolve the partnership. The prayer was for an accounting and for an adjudication of the rights of the parties under the contract with Murchison. The defendant's answer denied that the agreement with Murchison was made by the authority of the firm and was binding on it, and alleged that the plaintiffs had unlawfully paid him large sums, and threatened to continue such payments. Before the trial

Murchison was, on his motion, made a party and permitted to file an answer. In such answer, "by way of equitable counterclaim," he set out the agreement, and averred that the parties owed him upward of two thousand one hundred dollars thereunder, and prayed for an accounting.

At the trial it appeared that there was nothing to have an accounting about except the Murchison share of the Clark commissions. A decree was entered in favor of Murchison declaring the agreement to be binding upon the firm and awarding him, as against the plaintiffs and the defendant, three thousand dollars and costs of suit, and in favor of the plaintiffs and against the defendant Hull for fourteen hundred and fifteen dollars and twenty-seven cents and costs. The defendant Hull appealed to the appellate division, where the judgment was affirmed, two judges dissenting. He thereupon appealed to the court of appeals.

John Henry Hull, for the appellant.

J. Albert Lane, for the respondents.

¹² VANN, J. This action was brought by two copartners against the third for an accounting without a dissolution, and it is not surprising that a challenge is interposed to the jurisdiction of the court. The contract of copartnership has existed as long as the common law, and a vast amount of business has been transacted by persons working together under this relation. The law upon the subject is founded on the custom of merchants, who have thus in effect made their own law, yet we find no well-considered case which approves of such an action as the one now before us. While the novelty of an action is by no means conclusive against it, still it is suggestive when the history of the law relating to the subject shows many occasions and few efforts.

The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership and by a final decree to adjust all its affairs: Story on Partnership, sec. 229; Lindley on Partnership, 567; Gow on Partnership, 114; Parsons on Partnership, sec. 206; Bates on Partnership, sec. 910; Collyer on Partnership, sec. 236. It is not its office "to enter into a consideration of mere partnership squabbles" (*Wray v. Hutchinson*, 2 Mylne & K. 235, 238); or "on every occasion to take the management of every play-house

and brewhouse": *Carlen v. Drury*, 1 Ves. & B. 153, 158. If the members of a firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged and they should realize that, as a rule, they must settle their own differences or go out of business. As a learned writer has said: "A partner, who is driven to a court of equity as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved": *Parsons on Partnership*, 4th ed., sec. 206.

"If a continuance of the partnership is contemplated," as another commentator has said, "or if an accounting of only part of the partnership concerns is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day, incorrect to-morrow, and to entertain such bills on behalf of a partner would involve the court in incessant litigation, foment disputes, and needlessly drag partners not in fault before the public tribunals": 2 *Bates on Partnership*, sec. 910. Judge Story declared that "a mere fugitive, temporary breach, involving no serious evils or mischief, and not endangering the future success and operations of the partnership, will, therefore, not constitute any case for equitable relief. . . . It is very certain that, pending the partnership, courts of equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern": *Story on Partnership*, secs. 225, 229.

While a forced accounting without a dissolution is not impossible, it is by no means a matter of course, for facts must be alleged and proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Thus, Mr. Lindley, upon whom reliance was placed by the courts below, mentions three classes of cases as exceptions to the general rule: 1. Where one partner has sought to withhold from his copartner the profits

arising from some secret transaction; 2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or drive him to a dissolution; 3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action and a limited account will result in justice to them all."

The plaintiffs claim that this case belongs to the second class, and the courts below have so held, but, as we think, it ¹⁵ does not come under any head of Mr. Lindley's classification, which is correct as far as it goes, and it goes as far in the direction of the plaintiffs' theory as any just classification that can be made.

There is neither allegation nor evidence that Hull tried to exclude or expel the plaintiffs, or to drive them to a dissolution, or that he did anything in bad faith or with an ulterior purpose. The controversy was confined to one point of difference, the Murchison contract, which was a matter of internal regulation. There was no dispute about anything else. The plaintiffs claimed that the contract bound the firm, and that it included all work done or to be done for Mr. Clark, while Hull claimed that it did not bind the firm, and that if it did, it embraced only a part of that work. There was no difference in the computation of balances, or claim that the articles had been violated by either side, except with reference to that contract. The plaintiffs insisted that Hull had drawn out more than his share of the profits, because he drew one-third of the income without leaving one-third of the part going to Murchison, and that thus there was a balance against him. Hull claimed that the plaintiffs in paying anything to Murchison wasted the assets of the firm, and thus there was a balance against them. When the interlocutory judgment was made, the parties at once stipulated the respective balances on the basis of that decree, and thus obviated a reference so that final judgment was entered without delay. Neither party desired an accounting, except as an excuse to sustain or defeat the Murchison contract. Exclusion from a small portion of the profits, paid or withheld in good faith on account of that contract, was not exclusion from the affairs of the firm, yet an accounting was sought only as a means of settling the dispute over that particular subject, which related simply to a detail in the management of the business. No discovery was asked for. There was no claim that Hull was insolvent, or that he had suppressed any fact, or had made

secret profits, or had been guilty of bad conduct, or that the books had not been properly kept, or that the plaintiffs had¹⁶ been denied access to the books. There was no evidence that any partner had refused to give an account of all moneys received by him, or that there was error or omission of any kind in the accounts of the firm, except as limited to the Murchison agreement. It was easy to test the validity of that contract by simply withholding payment, forcing Murchison to sue and raising the question by answer. That was not an equitable, but a legal question. Murchison's claim did not differ from that of any firm creditor, except that the partners were at odds over its validity. "No action can be maintained by one partner against the other in respect to particular items of account pertaining to the partnership business": *Thompson v. Lowe*, 111 Ind. 274, 12 N. E. 477. An accounting without a dissolution has never been allowed under the circumstances of this case by any court in this country or in England, so far as we can learn from the authorities cited by counsel or discovered by ourselves. A brief review of the leading cases will show that the principle upon which they rest has no application to the facts of the case before us.

In *Fairthorne v. Weston*, 3 Hare, 387, the plaintiff bought into the business of an attorney, paying seven hundred pounds down and agreeing to pay seven hundred more at the end of five years, when the defendant was to retire and the business was to belong to the plaintiff. During the five years the parties were to be copartners, sharing the profits and expenses equally. After a while the defendant, for the fraudulent purpose of getting rid of his contract, received money and refused to account for it, excluded the plaintiff from all knowledge and control over the business, used insulting language toward him and violated the copartnership agreement in other ways and all in order to bring about a dissolution. A bill filed for an accounting, without a dissolution, was sustained upon the ground that the defendant was violating the contract in order to compel the plaintiff to submit to a dissolution upon very injurious terms and that the court had power to support as well as dissolve a partnership.

¹⁷ In *Richards v. Davies*, 2 Russ. & M. 347, a copartnership for a long term had not expired and the acting partner excluded the others "from the means of ascertaining the state of the partnership affairs." A bill for an accounting and to permit the plaintiffs "to have access to all the books of the

partnership" was sustained, but the court refused to make an order "for carrying on the partnership concerns unless with a view to dissolution." It is claimed that this case was overruled by *Knebell v. White*, 2 *Younge & C.* 15, where it was held that a bill for an account of partnership transactions must pray for a dissolution or the court could not take jurisdiction.

From the fragmentary report of *Harrison v. Armitage*, 4 *Madd.* 143, it appears that the defendant denied that there was any partnership and the court so held, but remarked orally that one partner might file a bill against another for an account without asking for a dissolution, although not in a case of interim management. The remark was obiter, and so limited as not to include the case we are considering, yet it is one of the few authorities relied upon by those who claim that courts of equity should open their doors to admit quarreling copartners.

In *Knowles v. Haughton*, 11 *Ves. Jr.* 168, the existence of the partnership was denied by the defendant, who claimed that the plaintiff "was merely employed as a clerk." An accounting was granted without a dissolution, the object being to establish the partnership.

In *Loscombe v. Russell*, 4 *Sim.* 8, there was a partnership for seven years, "and so from seven years to seven years, till determined by notice." After the first period had expired and one year of the second, a bill was filed for an account of the profits upon the allegation that no settlement had been made for the last three years. In dismissing the bill the court said: "With respect to the law of this court upon this subject, there is no instance of an account being decreed of the profits of a partnership on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. ¹⁸ With respect to occasional breaches of agreement between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands neuter; but when it finds that the acts complained of are of such a character as to show that the partners cannot continue partners and that relief cannot be given but by a dissolution, the court will decree it, although it is not specifically asked. Here a dissolution is not prayed for and if the court were to do what is asked, it would not be final."

Under similar circumstances, Lord Eldon dismissed the bill in *Forman v. Homfray*, 2 Ves. & B. 329, observing "that if a partner can come here merely for an account, pending the partnership, there seems nothing to prevent his coming annually."

In *Taylor v. Davis*, 4 L. J., N. S., 18, an injunction was granted restraining the defendant from retaining in his sole possession and excluding the plaintiff from access to a book kept by the firm and indispensable to the business. The book had been abstracted by the defendant and he had threatened to burn it.

In *Marshall v. Colman*, 2 Jacob & W. 266, the court declined to restrain the defendant from violating the articles of partnership in refusing to use the name of the plaintiff as a part of the firm name in the transaction of firm business. The lord chancellor said: "It would be quite a new head of equity for the court to interfere where one party violates a particular covenant and the other party does not choose to put an end to the partnership; in that way there may be separate suit and a perpetual injunction in respect of each covenant and that is a jurisdiction that we have never decidedly entertained."

In *Knebell v. White*, 2 Younge & C. 15, previous conflicting decisions were considered and the court said: "It may now, therefore, be considered as settled that in the case of ordinary trading partnerships, an account of partnership transactions must be consequent upon a dissolution of the partnership."

¹⁹ These cases illustrate, if they do not exhaust, the instances where the courts of England have interfered, or refused to interfere, when a dissolution of the firm was not asked. In this country the question does not appear to have been directly decided, at least not in this state. It was not involved in *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979, nor in *Traphagen v. Burt*, 67 N. Y. 30, as will appear from an examination of the facts. The primary object of those actions was to establish a partnership with reference to a particular adventure, and they turned mainly on the existence and effect of an oral agreement between the parties. Our courts, and especially those having jurisdiction under the laws of Congress, have sometimes interfered by injunction in a flagrant case of danger and injustice, although no dissolution of the firm was contemplated: *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Leavitt v. Windsor Land etc. Co.*, 54 Fed. 439, 4 C. C. A. 425. This is quite different from an action for an accounting with-

out a dissolution, where no especial reason is alleged or proved to show that one is necessary, or to authorize a departure from the general rule.

A court of equity will not take cognizance of an action for an accounting as a mere incident to the settlement of a solitary matter in dispute between partners, when it is not vital to either party or to the business and dissolution is not sought. Actions to establish a partnership, the existence of which was denied by the partner in control; to give a partner access to the books after persistent refusal, or to permit him to take part in the business from which he had been excluded, are founded on intentional and continuous wrongdoing which, unless arrested, might subvert the partnership. When one party seizes or absorbs the entire business, or usurps rights of his copartner which are essential to his safety or the safety of the firm, or persists in misconduct so gross as to threaten destruction to the interests of all, the court may intervene to restore the rights of the innocent party or to rescue a paying business from ruin. Extreme necessity only, however, will justify interference without a ²⁰ dissolution. There was no sufficient reason for an appeal to a court of equity in the case under consideration. There was no equity in the bill as filed by the plaintiffs and none in the case made for them by the evidence. The defendant Murchison had an adequate remedy at law, and he can take nothing from his intrusion into the litigation, under the circumstances, for the questionable order admitting him as defendant did not create a cause of action nor add to the jurisdiction of the court. All the parties should be put back where they were before the action was commenced, and, hence, it is our duty to reverse the judgments below and dismiss the complaint, with costs to the defendant Hull against the plaintiffs and the defendant Murchison.

Gray, O'Brien, Haight, Martin and Cullen, JJ., concur.

Parker, C. J., absent.

Judgments reversed..

A *Bill* for an accounting between partners which does not also seek a dissolution of the partnership cannot ordinarily be maintained: Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777. This rule, however, does not seem to be inflexible: Pirtle v. Penn, 3 Dana, 247, 28 Am. Dec. 70. As to what is a sufficient cause for the dissolution of a partnership, see the monographic notes to Breau v. Le Blanc, 69 Am. St. Rep. 410-436; Slemmer's Appeal, 98 Am. Dec. 260-271.

ZANDER v. NEW YORK SECURITY AND TRUST CO.

[178 N. Y. 208, 70 N. E. 449.]

BANKS AND BANKING—Suit on Lost Certificate of Deposit.—Where a certificate of deposit purports to be payable to C. J. on return of the certificate "which is assignable only on the books of the company," she may, on loss of the certificate, maintain an action thereon against the company without giving any bond of indemnity, because such certificate is not negotiable and the bank could not be held liable to any assignee of such certificate of whose rights it had no notice when making payment to such person as appeared on its books to be the holder of the certificate. (pp. 493, 494.)

Appeal from a judgment of the appellate division of the supreme court of the first judicial department, which affirmed an interlocutory judgment of the special term overruling a demurrer to the plaintiff's complaint.

Charles A. Boston, for the appellant.

Philip L. Wilson, for the respondent.

CULLEN, J. The action is brought on a certificate of deposit issued by the defendant to the plaintiff for the sum of five hundred dollars which it is alleged the plaintiff has inadvertently lost or destroyed. The complaint further alleged that payment of said certificate had been demanded, but that the defendant refused to pay the same unless the plaintiff would give it a sufficient bond of indemnity against loss by reason of the failure to produce the certificate, which bond the plaintiff has been unable and unwilling to give. To this complaint the defendant demurred as not stating facts sufficient to constitute a cause of action. The demurrer has ²⁰⁰been overruled and judgment entered thereon awarding to the plaintiff unconditionally the amount due on the certificate.

The only point the appellant seeks to raise on this appeal is its right in indemnity from liability on the lost certificate. It contends that as the plaintiff has refused to give such indemnity the complaint should be held not to state a good cause of action or, at least, that the judgment of the courts below should be so modified as to award the plaintiff a recovery only on the delivery of such indemnity. The certificate of deposit which is the subject of this suit is in the following form:

"\$500.

No. 3711.

"The New York Security and Trust Company.

"New York, July 11, 1901.

"Has received from Caroline Zander the sum of five hundred dollars of current funds, upon which the said company agrees to allow interest at the annual rate of three per cent from this date, and on five days' notice will repay, in current funds, the like amount, with interest, to the said Caroline Zander, or her assigns, on return of this certificate, which is assignable only on the books of the company. The right is reserved by this company, upon giving five days' notice, to reduce the rate, or discontinue the payment of interest on this certificate, or pay the principal, such notice to be given personally or through the mail, directed to the address named in the books of the company."

The defendant's argument is twofold: 1. It urges that the certificate is a negotiable instrument; 2. That if it should not be held to be a negotiable instrument, the defendant, on account of the provision therein contained, that the amount due is payable on the return of the certificate, would, in analogy to the law relating to certificates of stock, be liable to third parties who might acquire for value the certificate. Doubtless a certificate of deposit may be issued in the form of a negotiable instrument: *Frank v. Wessels*, 64 N. Y. 155. But from our examination of the subject there seems to be no uniform usage in commercial circles or ^{with} with monetary institutions as to their forms. Some are plainly negotiable, some equally plainly are not negotiable, while between the two extremes are many of the debatable class. The instrument before us is payable to the plaintiff or her assigns. While the usual terms employed to confer negotiability on an instrument for the payment of money are to make it payable to order or bearer, still instruments payable to assigns have been held to be negotiable in cases where it was apparent from the whole nature of the instrument and the language employed that such was intended to be their character: *Brainerd v. New York etc. R. R. Co.*, 25 N. Y. 496; *City Sav. Bank v. Town of Greenburgh*, 173 N. Y. 215, 65 N. E. 978. See *Negotiable Instruments Law*, 612, Laws 1897, sec. 29. Therefore, had the first sentence of the certificate terminated with the words "on return of this certificate" it might be claimed, not without force, that the certificate was intended to be negotiable. But the words quoted are followed by the provision "which is assign-

able only on the books of the company." We think the clear effect and intent of this provision was to render the instrument non-negotiable and to protect the company in dealing with the holder of the certificate as such holder might appear on the books of the company, without liability to third parties to whom, unknown to the defendant, it might have been transferred. If such were not the object we are at a loss to discover any purpose which it was intended to subserve. This construction is fortified by the subsequent provision for reduction of rate of interest or payment of principal upon notice to the address named in the books of the company. We conclude, therefore, that from a consideration of the language of the certificate as a whole it is not a negotiable instrument.

Nor do we think that the defendant can be rendered liable to any assignee by way of estoppel for its failure to require a return of the certificate as a condition for the payment of the amount deposited. The case of stock certificates is not analogous to that of certificates of deposit. The object of requiring a surrender and return of the certificate as a condition precedent to the transfer of stock is to give to such certificates a certain degree of negotiability which, without this condition, could not be obtained. No consideration of that character is applicable to instruments for the payment of money. If one wishes to make a pecuniary obligation negotiable the law permits him to do so and it is readily accomplished by making the obligation payable to bearer or to order. There is, therefore, no reason in such a case for resorting to the indirect means used in the case of stock certificates, means which are effective only to a limited extent. Moreover, the two instruments differ entirely in character. A stock certificate is merely a muniment or representative of title. The stock which it represents exists apart from the certificate and its existence is contemplated to endure so long as the corporation continues. The owner, as he appears on the books of the company is entitled to the dividends or profits, and it is only when he seeks to transfer his title to another that a surrender of the outstanding certificate is required as a condition precedent to the issue of a new one. But an instrument for the payment of money contemplates payment at some time, either at a date fixed or on demand. The condition that the certificate be surrendered at the time of its payment is no more than the law would require without a provision to that effect: *Bailey v. County of Buchanan*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A.

562. This condition is qualified, however, by an implied exception in the case of loss or destruction: *Frank v. Wessels*, 64 N. Y. 155; *Wilcox v. Equitable Life Assur. Soc.*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857. Such a requirement expressed in a certificate, therefore, does not constitute an estoppel in favor of a purchaser for value as it would in the case of a stock certificate. As the defendant can incur no liability from the failure to produce and surrender the certificate on its payment, it follows it is not entitled to indemnity.

The judgment appealed from should be affirmed, with costs.

Gray, O'Brien, Haight, Martin and Vann, JJ., concur.

Parker, C. J., absent.

Judgment affirmed.

Certificates of Deposit are regarded as negotiable instruments in *Hatch v. First Nat. Bank*, 94 Me. 348, 80 Am. St. Rep. 401; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. Rep. 526.

Actions on Lost Instruments are discussed in the monographic note to *Matthews v. Matthews*, 94 Am. St. Rep. 465-480; and actions on lost certificates of deposit are discussed in the note to *Hillsinger v. Bank*, 75 Am. St. Rep. 57.

MADIGAN v. OCEANIC STEAM NAVIGATION CO.

[178 N. Y. 242, 70 N. E. 785.]

MASTER AND SERVANT—*Liability of the Former to His Servants*.—Whether a master shall be held liable when the negligent act, or omission to act, was that of one of his servants, depends usually, if not always, on the character of the act. If it is one the doing of which can be properly and justly regarded as within the personal duties of the master whose performance he has delegated to another, and not some act within the line of the mere servant's duties, then the master is properly chargeable with the result of the negligent performance or omission. (p. 496.)

MASTER AND SERVANT—*Duty Resting on Foreman as Fellow-servant*.—If a coal foreman in charge of a gang of stevedores errs in his judgment of the necessity for lighting a lamp, whereby an injury results to one of them, the error respects a duty resting on the foreman as a fellow-servant, and the master is not liable. (pp. 498, 499.)

Appeal from a judgment of the appellate division of the supreme court of the first judicial department reversing a judgment of the trial term setting aside a verdict in favor of the plaintiff and granting a new trial.

Everett P. Wheeler and Clarence Bishop Smith, for the appellant.

Richard T. Greene, for the respondent.

344 GRAY, J. The plaintiff's husband was employed by the defendant as one of a gang of stevedores and, while engaged upon the work of transferring coal from a barge into the steamship "Oceanic," he was killed. The plaintiff has sued to recover damages for his death, charging that it was caused through the negligence of the defendant. The plaintiff obtained a verdict in her favor; but the trial court set it aside and ordered a new trial. The appellate division, reviewing this order upon an appeal, reversed it and directed judgment to be entered for the plaintiff, in accordance with the verdict rendered. In that determination, the court was not unanimous and, upon this appeal by the defendant, the sole question, actually, is whether it had fulfilled its whole duty to its employé with respect to providing a safe place for him in which to do his work. It was, and is, charged by the plaintiff that the defendant was negligent in the failure to supply lamps, or lights, to illuminate the interior of the coal barge, where the deceased was stationed upon the occasion in question. That omission, as it appears from the opinion of the majority of the appellate division justices, was regarded as having been the cause of the accident and because the coal foreman of the defendant was in charge of the work and represented the latter in that respect, his negligence in failing to provide the lights was to be attributed to the general employer.

The facts may be briefly stated. The coal barge lay between the steamship and the wharf, and a number of stevedores, of whom the deceased was one, were in the hold of the barge, engaged in shoveling coal into buckets, which were let down into the hold at the end of a rope, or "fall." When they were filled, they would be hoisted out and up the side of the steamship. The captain of the barge stood upon the barge's deck and, by the use of a guy rope attached to the "fall," he was able to control the rise of a bucket from, or its descent into, the hold. The importance of this was in the necessity of preventing the buckets from swinging to and fro and against the side of the vessel. Upon this occasion, work was commenced in the middle of the day and was continued until **345** after sunset, when the hold had become darkened. McDonald was the defendant's coal foreman, who employed and

directed the other stevedores, and it came within his duties to get out lamps, whenever the darkness made them necessary. He did not do so at this time, as he testified, because he "did not think it necessary." A bucket, which had been filled with coal on the side of the hold farthest away from the steamship, was being hoisted, when, from the failure of the barge's captain to properly secure the guy rope, it swung violently over and toward the steamship, striking the head of the deceased against a bolt, projecting from the barge's side, and killing him. The barge's captain testified that it was too dark to enable him to see into the hold and that he did not know the coal bucket was hooked on. As the case was submitted to the jury, it is clear that the verdict must have been reached upon the theory that the defendant was liable for the foreman's neglect to supply the lights.

It was not disputed that the defendant had provided lamps, sufficient and quite available to the foreman for the men's use. They were in sheds on the wharf, and also upon the steamship, and if they were not used upon this occasion, it was, simply because, in the foreman's judgment, they were not required. I cannot agree with the court below that the omission, or neglect, of this foreman was chargeable to the defendant. That he was so far the alter ego of the master, as to make the latter responsible for any failure to furnish a safe place to work in, or safe appliances to work with, may be readily admitted; but if, as to some detail of the undertaking, he was actually doing the work devolving upon a servant, the others took the risk of their fellow-servant's performance. The defendant was not at fault in any of those general respects in which an employer is regarded as under obligations toward those whom he employs to work for him. The hold of the barge was a safe enough place to work in; the foreman was competent and no complaint is made as to the machinery, or appliances, used in the work. Whether a master shall be held to be liable, when the negligent ²⁴⁶ act, or omission to act, was that of one of his servants, depends usually, if not, indeed, always, upon the character of the act; that is to say, if the specific act is one, the doing of which can be, properly and justly, regarded as within the personal duties of the master, whose performance he has delegated to another, and not some act within the line of a mere servant's duty, then the master is properly chargeable with the results of a negli-

gent performance, or omission. When McDonald, the defendant's coal foreman, in the exercise of his judgment, omitted to get the lamps for the stevedores, which the defendant had been careful to provide, I think that it was the omission of a duty resting on the foreman as a fellow-servant, having that detail in charge. It was either for him to judge when the lamps were needed, or it was for the others to demand them, if the place had become too dark to remain in at work. There is no evidence of their having made any request of the foreman; so that, if the conditions had become so changed as to render continuance in their work dangerous, they all erred in their judgment. As it was said in *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860, where it was a question of sufficiently safe scaffolding, put up under the instructions of a foreman by the workmen, "it was, at most, but an error of judgment on the part of the foreman with respect to a detail of the work, in which the masons (in that case) were engaged. He concluded, as the workmen themselves did, that the place was safe and, in determining that question, they were all co-servants." In *Crispen v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521, the plaintiff, a laborer, was injured, while engaged with others in lifting the fly-wheel off of an engine. The defendant, in that case, had intrusted the conduct of his business to a general manager and he, upon the occasion in question, carelessly started the engine. It was held that, notwithstanding his position, he was not, in what he did, acting in the defendant's place. It was observed, in the opinion, that "a superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant²⁴⁷ of the other operatives." In *Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369, 40 N. E. 507, where it was claimed that the deceased had come to his death by reason of certain gangway doors in the side of the vessel having been carelessly left open, through which he had fallen, we held that the defendant was not liable for the failure of the officer, whose duty it was to close the doors, and that the negligence, which led to the result, was that of a co-servant. These cases, and others which might be cited, rest upon the principle that the liability of the master does not depend upon grade or the rank of the servant, who represents him in the superintendence of the others in his employment, but the act which causes or results in an injury in the course of the work

must be of a character which the master, as such, should perform, and not one which would be expected of a servant as such.

Here, the defendant provided a supply of lamps for its servants and they could, and should, have taken and used them, when they were required. To get them was a mere detail of the work, which it was the foreman's duty, as one of a number of servants engaged in a common task, to execute.

I advise the reversal of the order of the appellate division and that a new trial be had, with costs to abide the event.

Parker, C. J., O'Brien, Bartlett, Haight, Cullen, JJ. (and Martin, J., in result), concur.

Order reversed, etc.

On *Who are Fellow-servants*, see the monographic notes to *Fox v. Sandorf*, 67 Am. Dec. 588-597; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 2, 33. Tests for determining the question are given in the recent cases of *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216; *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883. As to whether a foreman is a vice-principal or a fellow-servant with the employes under him, see the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 613-621, and the recent cases of *Enright v. Oliver*, 69 N. J. L. 857, 101 Am. St. Rep. 710; *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706, and cases cited in the cross-reference note thereto. As to whether employes engaged in unloading a ship are fellow-servants, see *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 70 Am. St. Rep. 932.

PIERSON v. SPEYER.

[178 N. Y. 270, 70 N. E. 709.]

A RIPARIAN OWNER is Entitled to the reasonable use of the water flowing in a natural stream over his premises. He may use it for domestic purposes both in his house and barn and consume it for the support of his horses, cattle and poultry, and may temporarily detain it by dams in order to furnish power to run machinery and for the purpose of irrigating his lands, when the amount used is reasonable and not out of proportion to the size of the stream. He may also construct ornamental ponds and store them with fish, so long as the size of the ponds is not so large as to materially diminish by evaporation and absorption the quantity of water usually flowing in the stream. (p. 501.)

AN UPPER RIPARIAN OWNER has the Right to the First Reasonable Use of the Water flowing through a stream, taking into consideration its size and velocity. (p. 502.)

RIPARIAN OWNERS—What Use of Water is not Presumed to be Unreasonable in the Absence of Findings to that Effect.—Where an upper riparian proprietor constructs a dam across a stream on his own premises, thereby creating a reservoir one and a half acres in extent and impounding the water therein for both ornamental and domestic purposes, exposing a much larger surface to the sun and air than otherwise would have been exposed, and the increased evaporation and absorption cause the water to cease flowing on the lands of a lower proprietor, depriving him of the use of them to which he was entitled, it was held that an injunction against continuing the dam was not sustainable, in the absence of a specific finding that the use of the water made by the upper proprietor was unreasonable. (p. 502.)

Action to restrain the continuance of a dam. A judgment for the plaintiffs was affirmed on appeal to the appellate division of the supreme court of the second judicial department, and the defendant thereupon appealed to the court of appeals.

Charles J. Fay and Darius E. Peck, for the appellant.

Smith Lent, for the respondents.

HAIGHT, J. This action was brought to enjoin the defendant from intercepting the flow of water in a natural stream through his premises, or in any manner interfering with the same so as to diminish the natural flow of water therein through the plaintiffs' premises.

The defendant was the upper riparian owner and the plaintiffs the lower owners of the stream in question. The plaintiffs had constructed a dam and reservoir by which they impounded the waters of the stream for the purpose of supplying water daily to the growing of roses, a business in which they were engaged. In the summer of 1899 the defendant constructed a dam across the stream upon his own premises, thereby creating a reservoir about one and a half acres in extent and impounded the water therein for both ornamental and domestic purposes. The trial court found as a fact that by reason of the construction of the dam and reservoir by the defendant "a much larger surface of water is exposed to sun and air than otherwise would be exposed, and the increased evaporation and absorption caused the water to cease flowing to and over the plaintiffs' land and deprived them of the use of water to which they were entitled." There was no finding of fact that the defendant's use of the water was unreasonable. The decision was in what is commonly designated the "long form," containing specific findings of fact and conclusions of law. Upon these findings a judgment was entered, in which the defendant

"is enjoined and restrained from continuing or permitting to continue the dam erected by him herein described in said complaint," etc.

We think the judgment entered in this case was not authorized by the findings of fact made by the trial court. It is not pretended that the defendant made any unreasonable use of the water flowing through the stream upon his premises, that he diverted or polluted it, or that he decreased the amount of the flow other than by that which was caused from evaporation and absorption.

A riparian owner is entitled to a reasonable use of the water flowing in a natural stream over his premises. He may use it for domestic purposes both in his house and his barn, and may consume it for the support of his horses, his cattle and his poultry. He may temporarily detain it by dams, in order to furnish power to run machinery and for the purpose of irrigation of his lands when the amount used is reasonable and is not out of proportion to the size of the stream. He may also construct ornamental ponds and store them with fish, or use them for his geese, his ducks or his swans, so long as ²⁷³ the size of the ponds are not so large as to materially diminish, by evaporation and absorption, the quantity of water usually flowing in the stream.

The rights of riparian owners have been the subject of recent consideration in this court in the case of *Strobel v. Kerr Salt Co.*, 164 N. Y. 303-320, 79 Am. St. Rep. 643, 58 N. E. 142, 51 L. R. A. 687, in which the authorities and text-writers upon the subject have been collected and cited. In that case Judge Vann states the general rule as follows: "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use of each must, therefore, be consistent with the rights of the others, and the maxim of 'sic

utere tuo' observed by all. The rule of the ancient common law is still in force; aqua currit et debet currere, ut currere solebat. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use": See, also, Broom's Legal Maxims, *373; Pomeroy on Water Rights, secs. 7, 8; Cummings v. Barrett, 10 Cush. 186.

²⁷⁴ The defendant in this case, as we have seen, was the upper riparian owner. By reason thereof he had the right to the first reasonable use of the water flowing through the stream, taking into consideration the size and velocity thereof; and, in the absence of a finding that the use made by him of the water under the circumstances was unreasonable, there was no basis for the judgment that was entered herein. It follows that the judgment should be reversed and a new trial ordered, with costs to abide the event.

Parker, C. J., O'Brien, Bartlett, Vann, Cullen, and Werner, JJ., concur.

Judgment reversed, etc.

Each Riparian Owner on a stream has an equal right to the use of the water for ordinary purposes, even though such use may in some degree lessen the volume of water or affects its purity: People v. Hulbert, 181 Mich. 156, 100 Am. St. Rep. 588, and cases cited in the cross-reference note thereto.

GILLESPIE v. BROOKLYN HEIGHTS RAILROAD CO.

[178 N. Y. 347, 70 N. E. 857.]

STREET RAILWAYS.—It is the Duty of a Street Railway to Receive any Coin or Bill not in excess of the amount permitted to be tendered for fare on its cars under its rules and regulations, and to make and return change, and the refusal of its conductor to return change is a tortious act performed while acting in the line of his duty for which his employer is answerable. (pp. 504, 505.)

STREET RAILWAYS, Liability of for Insulting Remarks of Conductor to Passenger Respecting Change Due.—If a conductor receives a coin in excess of the amount due for a passenger's fare, and, being asked for the change, denies that any is due, and proclaims in the presence of other persons that the claimant is a deadbeat and swindler whereby she is occasioned suffering, humiliation, wounded pride and disgrace, she is entitled to recover of the corporation damages in excess of the amount wrongfully retained by the conductor. (p. 505.)

STREET RAILWAYS, When Liable in Tort.—Any passenger rightfully on the cars of a street railway is entitled to protection by the carrier, and any breach of his duty in this respect is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of contract. (p. 505.)

STREET RAILWAYS—Damages Recoverable from for Insulting Conduct of Employee.—Where a street-car conductor, on being asked for change due to a passenger, falsely proclaims in the presence of others that she is a deadbeat and swindler, among the elements of compensatory damages recoverable for the wrong are the humiliation and injury to her feelings, not including punitive or exemplary damages. (pp. 511, 514.)

Action brought by the plaintiff, a woman, against the defendant railway corporation. The testimony tended to show that she, after boarding the defendant's car, gave the conductor twenty-five cents in payment of her fare, and soon afterward demanded the change. Thereupon he denied that he had received any sum in excess of the fare, and declared that he knew the likes of the plaintiff, that she was a deadbeat and a swindler, and when a fellow-passenger undertook to set him right by telling him she was sure the plaintiff gave him a quarter of a dollar, he accused her of being a friend of the plaintiff. He then went on talking to the other passengers about the plaintiff and how she was trying to beat him out of money. The plaintiff then told him she knew the president of the corporation and would complain of him. The conductor replied that she could not, that he had been too long on the road for the plaintiff to have any authority with the president. The plaintiff testified that she smelt whisky on the conductor's breath and

that he gave her no change and no transfer; that, for want of money, she walked about four miles to the president's office, and from this overexertion became sick and was confined to her bed two days, and that this had an injurious effect on her business.

The defendant at the close of the plaintiff's evidence moved for a dismissal of the cause. This was denied, but the court directed the jury to return a verdict for twenty cents only, that being the amount of the change due the plaintiff. The plaintiff excepted. On appeal by her to the appellate division of the supreme court in the second judicial department the judgment was affirmed.

Melville J. France and James D. Bell, for the appellant.

I. R. Oeland and George D. Yeomans, for the respondent.

³⁵¹ MARTIN, J. The principal and practically the only question involved upon this appeal is whether the plaintiff was entitled to recover for the tort or breach of contract proved, an amount in excess of the sum she actually overpaid the defendant's conductor. Confessedly the plaintiff was a passenger on the defendant's car and entitled to be carried over its road. That at the time of this occurrence the relation of carrier and passenger existed between the defendant and the plaintiff is not denied. The latter gave the conductor a quarter of a dollar from which to take her fare, he received it, but did not return her the twenty cents change to which she was entitled. She subsequently asked him for it, when he, in an abusive and impudent manner, not only refused to pay it, but also grossly insulted her by calling her a deadbeat and a swindler, and by the use of other insulting and improper language, even after a fellow-passenger had informed him that she had given him the amount she claimed.

In this case there was obviously a breach of the defendant's contract and of its duty to its passenger. It was its duty to receive any coin or bill not in excess of the amount permitted to be tendered for fare on its car under its rules and regulations, and to make the change and return it to the plaintiff or person tendering the money for the fare. That certainly ³⁵² must have been a part of the contract entered into by the defendant, and the refusal of the conductor to return her change was a tortious act upon his part, performed by him while acting in the line of his duty as the defendant's servant.

To that extent, at least, the contract between the parties was broken, and as an incident to and accompanying that breach, the language and tortious acts complained of were employed and performed by the defendant's conductor.

This brings us to the precise question whether, in an action to recover damages for the breach of that contract and for the tortious acts of the conductor in relation thereto, the conduct of such employé and his treatment of the plaintiff at the time may be considered upon the question of damages and in aggravation thereof. That the plaintiff suffered insult and indignity at the hands of the conductor, and was treated disrespectfully and indecorously by him under such circumstances as to occasion mental suffering, humiliation, wounded pride and disgrace, there can be no doubt. At least the jury might have so found upon the evidence before them.

This question was treated on the argument as a novel one, and as requiring the establishment of a new principle of law to enable the plaintiff to recover damages in excess of the amount retained by the defendant's conductor which rightfully belonged to her. In that, we think counsel were at fault, and that the right to such a recovery is established beyond question, as will be seen by the authorities which we shall presently consider. The consideration of this general question involves two propositions: The first relates to the duties of carriers to their passengers; and the second to the rule of damages when there has been a breach of such duty.

The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort and recovery may be had in an action of tort as well as for a breach of the contract: 2 Sedgwick on ³⁵³ Damages, 637. In considering the duties of carriers to their passengers, we find that the elementary writers have often discussed this question, and that it has frequently been the subject of judicial consideration. Thus in Boeth on Street Railways, section 372, it is said: "The contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It calls for safe carriage, for safe and respectful treatment from the carrier's servants, and for immunity from assaults by them, or by other

persons if it can be prevented by them. No matter what the motive is which incites the servant of the carrier to commit an improper act toward the passenger during the existence of the relation, the master is liable for the act and its natural and legitimate consequences. Hence, it is responsible for the insulting conduct of its servants, which stops short of actual violence."

In *Hutchinson on Carriers*, sections 595, 596, the rule is stated as follows: "The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, as have been seen, the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. . . . The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. ³⁵⁴ If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust."

In *Thompson on Negligence*, section 3186, the learned writer, after stating the foregoing rule, adds: "The carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give

him decent treatment en route. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out. The intendment of the law is that he contracts absolutely to protect his passenger against the misconduct of his own servants whom he employs to execute the contract of carriage. The duty of the carrier to protect the passenger during the transit from the assaults and insults of his own servants being a duty of an absolute nature, the usual distinctions which attend the doctrine of respondeat superior cut little or no figure in the case."

Again, in Schouler on Bailments, section 644, it is said: "Nor is it only good treatment from fellow-passengers and from strangers coming upon the car, vessel or vehicle that each passenger is entitled to, but he should be well treated by the passenger-carrier himself and all whom such carrier employs in and about the vehicle in the course of the journey. If the general doctrine of master and servant may be said to apply here, it applies with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, malicious, and, so to speak, such as one's strict contract of service or agency does not readily imply. Such is the general construction, so long as the offensive words and acts of a ³⁵⁵ conductor, . . . or other such servant complained of, were said or committed in the usual line of duty, while, for instance, scrutinizing tickets and determining the right to travel, excluding offenders and trespassers, and enforcing, or pretending to enforce, the carrier's rules aboard the vehicle; and this, whether the transportation of passengers be by land or water."

Having thus considered a portion of the elementary authorities relating to this question, we will now consider a few of the many decided cases relating to the same subject. In Chamberlain v. Chandler, 3 Mason, 242, 245, Fed. Cas. No. 2575, Judge Story, who delivered the opinion of the court, in discussing the duties, relations and responsibilities which arise between the carrier and passenger, said: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence, on board, but for reasonable food, comforts, necessities and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for

that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further: it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings, which aggravates every evil, and endeavors by the excitement of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds. . . . It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion ³⁵⁴ is, that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct. or of consequential, injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage." In *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549, it was held that an electric street railway company was liable in damage to a passenger for the injury to his feelings by the indecent and insulting language of its employé, upon the ground, not of tort or negligence, but of breach of its contract that obligates the carrier not only to transport the passenger but to guarantee him respectful and courteous treatment, and to protect him from violence and insult from strangers and from its own employés; that as to the latter, the obligation of its contract is absolute; and that it selects its agents to perform its contract, and the carrier and not the passenger must assume the responsibility for the acts and conduct of such agents. In *Cole v. Atlanta etc. R. R. Co.*, 102 Ga. 474, 477, 31 S. E. 107, it was held that it was the unquestionable duty of a railroad company to protect a passenger against insult or injury from its conductor, and that the unprovoked use by a conductor to a passenger of opprobrious words and abusive language tending to humiliate the passenger or subject him to mortification, gives to the latter a right of action against

the company. In that case it was said: "The carrier's liability is not confined to assaults committed by its servants, but it extends also to insults, threats, and other disrespectful conduct." In *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 213, 2 Am. Rep. 39, it was held that a common carrier of passengers is responsible for the misconduct of his servant toward a passenger. In that case, Walton, J., delivering the opinion of the court, said: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now ³⁵⁷ well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. . . . He must not only protect his passenger against the violence and insults of strangers and copassengers, but a fortiori against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible"; citing *Howe v. Newmarch*, 12 Allen, 55; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465, 64 Am. Dec. 83; *Seymour v. Greenwood*, 7 Hurl. & N. 355; *Milwaukee etc. R. R. Co. v. Finney*, 10 Wis. 388; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502; *Pittsburgh etc. Ry. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Flint v. Norwich etc. Transp. Co.*, 34 Conn. 554, Fed. Cas. No. 4873; *Landreaux v. Bell*, 5 La., O. S., 434; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277. The decision in *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507, 16 Pac. 937, was to the effect that where a conductor, in ejecting a person from a train, uses insulting or abusive language, such person may recover damages therefor on account of the injury to his feelings, but cannot in an action for damages for his expulsion also receive damages because the words used tended to bring him into ignominy and disgrace. So in *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, it was held that a railroad company is bound to protect female passengers on its trains from all indecent approach or assault, and where a conductor on the company's train makes an assault, the company is liable for compensatory damages. In *Bryan*

v. Chicago etc. Ry. Co., 63 Iowa, 464, 19 N. W. 295, it was also held that an action by a passenger on the defendant's road would lie for injuries sustained from insolent, abusive and offensive words spoken to her by the conductor. In *McGinnis v. Missouri Pac. Ry. Co.*, 21 Mo. App. 399, the decision of the United States court in *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2575, was followed and the discussion of the court in that case closely followed the discussion by Judge Story. In *Spohn v. Missouri Pacific Ry. Co.*, 87 Mo. 74, the court held that the ³⁵⁸ company was liable to its passengers for any violence or insult from others while the relation of carrier and passenger existed: See, also, *Malecek v. Tower Grove etc. Ry. Co.*, 57 Mo. 17; *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600, 13 S. W. 530; *Winnegar v. Central Pass. Ry. Co.*, 85 Ky. 547, 4 S. W. 237; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536; *Block v. Bannerman*, 10 La. Ann. 1; *Coppin v. Braithwaite*, 8 Jur., pt. 1, 875. The duties arising between a carrier and passenger have been several times discussed in this state, as in *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 590, 43 Am. Rep. 185, where it was said: "By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. . . . "The carrier's obligation is to carry his passenger safely, and properly, and to treat him respectfully, and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." The court then quoted with approval the decision in *Nieto v. Clark*, 1 Cliff. 145, 149, Fed. Cas. No. 10,262, where it was said: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. . . . A common carrier undertakes absolutely to protect his passengers against the misconduct of their own servants engaged in executing the contract." Subsequently in *Dwinelle v. New York Cent. etc. R. R. Co.*, 120 N. Y. 117, 125, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224, the same doctrine was held and the fore-

going portion of the opinion in the Stewart case was quoted and reaffirmed by this court. It was then added: "These and numerous other cases hold that no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act toward the passenger ³⁵⁹ during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences." Again, in *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 266, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136, it was held that the corporation is liable for the acts of injury and insult by an employé, although in departure from the authority conferred or implied, if they occur in the course of the employment. In that case the employé alleged that the plaintiff was a counterfeiter and a common prostitute, placed his hand upon her and detained her for a while, but let her go without having her arrested. The action was to recover damages for unlawful imprisonment accompanied by the words alleged to have been spoken. This court held she was entitled to recover. The judge then said: "Though injury and insult are acts in departure from the authority conferred, or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed." The foregoing authorities render it manifest that the defendant was not only liable to the plaintiff for the money wrongfully retained by its conductor, but also for any injury she suffered from the insulting and abusive language and treatment received at his hands.

This brings us to the consideration of the elements of damages in such a case, and what may be considered in determining their amount. Among the elements of compensatory damages for such an injury are the humiliation and injury to her feelings which the plaintiff suffered by reason of the insulting and abusive language and treatment she received, not, however, including any injury to her character resulting therefrom. She was entitled to recover only such compensatory damages as she sustained by reason of the humiliation and injury to her feelings, not including punitive or exemplary damages. "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not and generally does ³⁶⁰ not depend

at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice. But whatever view is taken of this question it is clear that, where the expulsion is made in consequence of a mistake of another agent of the carrier, as in a case where a previous conductor erroneously punched the transfer check which he gave to the passenger so as to read 2:40 P. M. instead of 3:40 P. M., and in addition to this, the expulsion was accompanied by insulting remarks made to the passenger in the presence of others, damages may be given, founded on the humiliation and injury to the feelings of the passenger"; *Thompson on Negligence*, sec. 3288. The same doctrine is laid down in *Joyce on Damages*, sec. 354. In *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, where a passenger was ejected by the conductor, who honestly supposed the fare had not been paid, and no unnecessary force was used, it was held that the act of the defendant's servant, being unlawful, rendered the defendant liable for compensatory damages, including compensation for loss of time, the fare upon another car, and a suitable recompense for the injury done to the plaintiff's feelings. In *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645, it was held that where the plaintiff entered a car believing that his transfer was valid and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully and entitled to recover compensatory damages, including the indignity, humiliation and injury to his feelings by the remarks of the conductor and his wrongful ejection from the car. In *Miller v. King*, 84 Hun, 308, 310, 32 N. Y. Supp. 332, it was held that the conductor had no right to eject the plaintiff; that his action in doing so was unlawful, and that the plaintiff was entitled to damages for the indignity and humiliation suffered thereby: See, also, *Sedgwick on Damages*, sec. 865. In *Jacobs v. Third Ave. R. R. Co.*, 71 App. Div. 199, 202, 75 N. Y. Supp. 679, it was held that the plaintiff was entitled to recover compensatory damages, which embraced loss of time, the amount which the plaintiff was obliged to pay for passage upon another car, and injury done to his feelings³⁶¹ by reason of the indignity which he wrongfully suffered. The same doctrine was held in *Ray v. Cortland etc. Traction Co.*, 19 App. Div. 530, 534, 46 N. Y. Supp. 521. See, also, *Pullman's Palace Car Co. v. King*, 99 Fed. 381, 382, 39 C. C. A. 573. In *Shepard v. Chicago etc. R. R. Co.*, 77 Iowa, 54,

41 N. W. 564, the court charged the jury: "When a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law does not exactly measure his damages, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury may say is right," and it was held that his instruction was not subject to the objection that it authorized an allowance of exemplary damages, because damages may properly be allowed for mental suffering caused by indignity and outrage, and such damages are compensatory and not exemplary. In *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, it was held that in actions for personal torts the compensatory damages which may be recovered of the principal for the agent's act include not merely the plaintiff's pecuniary loss, but also compensation for mental suffering, and that in awarding compensatory damages in such cases no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong, or insult arising from an act really or apparently dictated by a spirit of willful injustice or by a deliberate intention to vex, degrade or insult. In *Cole v. Atlanta etc. R. R. Co.*, 102 Ga. 474, 479, 31 S. E. 107, it was held that even where there was no actual assault, but the company has failed in its duty to protect its passenger from insult, abuse and ill-treatment, the plaintiff is entitled to recover damages for the pain and mortification of being publicly denounced as a dead beat, and in that case it was said: "While this was a wanton act of commission by a servant of the company, it was also a negligent omission on the part of its servants to perform toward the plaintiff a duty imposed by law upon their master." Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury ^{345M} and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake: *Louisville etc. R. R. Co. v. Hine*, 121 Ala. 234, 25 South. 857. Where unnecessary violence was used in ejecting a passenger from a train, he is entitled to damages for the direct consequences of the wrong, including as well physical pain as mental suffering resulting from accompanying insults, if any: *Texas Pacific Ry. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347. A conductor of a railroad company represents the company in the discharge of his functions, and being in the line of his duty in collecting the fare, or tak-

ing up tickets, the corporation is liable for any abuse of his authority, whether of omission or commission. In that case the court, charged that "in estimating damages they might take into consideration the indignity, insult and injury to plaintiff's feelings by being publicly expelled," and it was held proper: *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817. Damages may be properly allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not, and such damages are compensatory and not exemplary: *Shepard v. Chicago etc. R. R. Co.*, 77 Iowa, 54, 41 N. W. 564. Where the plaintiff, holding a ticket, was wrongfully threatened with expulsion from the cars, charged with attempting to ride without paying therefor, and paid his fare rather than to be ejected, it was held that he was entitled to recover damages for the humiliation suffered and indignity done him by such action on the part of the conductor: *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439. Where a passenger is expelled from a train and without fault on his part, he may recover more than nominal damages, although he has suffered no pecuniary loss or received actual injury to the person by reason of such expulsion, and the jury in estimating the damages may consider not only the annoyance, vexation, delay and risk to which the person was subjected, but also the indignity done him by the mere fact of his expulsion: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133. A person wrongfully ejected from a train is entitled to recover such damages as he ³⁰³ may have sustained by the delay occasioned by the expulsion, and all the additional expenses necessarily incurred thereby, as well as reasonable damages for the indignity to which he was subjected in being expelled from the train: *Pennsylvania R. R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89. Where there was a wrongful expulsion of a passenger from the car, although unaccompanied by any physical force or violence, it is actionable, and in such a case the sense of wrong suffered and the feeling of humiliation and disgrace engendered is an actual damage for which the injured party may recover compensation, such damages being compensatory and not exemplary: *Willson v. Northern Pacific R. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. See, also, *Gulf etc. Ry. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239; *Louisville etc. Ry. Co. v. Goben*, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Hot Springs R. R. Co. v. Deloney*, 65 Ark. 177, 67 Am.

St. Rep. 913, 45 S. W. 351; Atchison etc. R. R. Co. v. Dickerson, 4 Kan. App. 345, 45 Pac. 975.

After this somewhat extended review of the authorities bearing upon the subject, we are led irresistibly to the conclusion that the defendant is liable for the insulting and abusive treatment the plaintiff received at the hands of its servant; that she is entitled to recover compensatory damages for the humiliation and injury to her feelings occasioned thereby, and that the trial court erred in directing a verdict for the plaintiff for twenty cents only and in refusing to submit the case to the jury.

The judgments of the appellate division and trial court should be reversed and a new trial granted, with costs to abide the event.

GRAY, J. I dissent; because I think it is extending unduly the doctrine of a common carrier's liability in making it answerable in damages for the slanderous words spoken by one of its agents.

Bartlett, Haight and Cullen, JJ., concur with Martin, J.

Parker, C. J., and O'Brien, J., concur with Gray, J.

Judgments reversed, etc.

It is the Duty of a Carrier to protect its passengers from injury, violence, insult and ill-treatment at the hands of strangers, fellow-passengers, and employes, and for a failure to perform this duty it is answerable (Birmingham Ry. etc. Co. v. Baird, 130 Ala. 354, 89 Am. St. Rep. 43; United Ry. etc. Co. v. Deane, 93 Md. 619, 86 Am. St. Rep. 453; Spade v. Lynn etc. R. R. Co., 172 Mass. 488, 70 Am. St. Rep. 298; Houston etc. R. R. Co. v. Phillio, 96 Tex. 18, 97 Am. St. Rep. 868; monographic notes to Rommel v. Schambacher, 6 Am. St. Rep. 734-757; Richmond etc. R. R. Co. v. Jefferson, 32 Am. St. Rep. 90-101; Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 59), and in exemplary damages if the act of an employe is willful or malicious: Lexington Ry. Co. v. Cozine, 111 Ky. 799, 98 Am. St. Rep. 430; monographic note to Hoboken Printing etc. Co. v. Kahn, 59 Am. St. Rep. 606.

PEOPLE v. VAN DE CARR.

[178 N. Y. 425, 70 N. E. 965.]

CONSTITUTIONAL LAW—Statutes Relating to the Desecration of the Flag, Purporting to Have a Retroactive Operation—A statute providing that any person who shall sell, expose for sale, give away or have in possession for sale, or to give away, or for use for any purpose, any article or substance upon which shall have been printed, painted, attached, or otherwise placed a representation of any flag, standard or ensign of the United States or state flag of the state, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which it is so placed, shall be deemed guilty of a misdemeanor, is unconstitutional. (p. 518.)

The relator was convicted of violating section 640 of the Penal Code of New York, which reads as follows: "Any person who, in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or state flag of this state or ensign, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise or a receptacle of merchandise upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than thirty days, or both, in the discretion of the court. The words flag, standard, color or ensign, as used in this subdivision or section, shall include any flag, standard, color, ensign or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or

ensign, of the United States of America, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America. This subdivision and section shall not apply to any act permitted by the statutes of the United States of America or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement."

He sued out a writ of habeas corpus, which was dismissed by an order of the special term. On appeal to the appellate division of the supreme court in the first judicial department, the order of dismissal was reversed. Thereupon an appeal was taken to the court of appeals.

William Travers Jerome, district attorney, and Howard Gans, for the appellant.

Louis Marshall, for the respondent.

428 PARKER, C. J. The constitution of this state vests the legislative power in the Senate and assembly, and subjects it to certain important limitations, one of which is that no person shall be "deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation": Const., art. 1, sec. 6.

In *Wynehamer v. People*, 13 N. Y. 378, *Wynehamer* was convicted of selling liquors contrary to a statute entitled "An act for the prevention of intemperance, pauperism and crime." This court holds in that case that if the statute was limited in its operation to the sale of liquors manufactured or imported after the act took effect it would be valid; but as the act goes further and substantially destroys the property in intoxicating liquors owned and possessed by persons within the state when the act took effect, it offends against the constitutional provisions quoted *supra* and is void, and may not be sustained in respect to any liquor whether existing at the time the act took effect or acquired subsequently.

This case and its doctrine is referred to with approval in *Matter of Townsend*, 39 N. Y. 171, 180, and again very recently in *People v. Orange County Road Cons. Co.*, 175 N. Y. 84, 93, 67 N. E. 129.

It is settled in this state, therefore, that a statute which attempts to destroy an existing property right is void.

The statute under which McPike was convicted provides that "Any person, who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing or any advertisement, of any nature, upon any flag, standard, color or ensign of the United States or state flag of this state or ensign, . . . or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for ⁴²⁹ use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article, or substance, on which so placed, . . . shall be deemed guilty of a misdemeanor."

The statute in express terms, therefore, applies as well to articles manufactured and in existence when it was lawful to manufacture them and have them in possession as to those thereafter manufactured or acquired. It attempts, therefore, to destroy existing property rights, and whether the value thereof be much or little, the legislature is powerless to effectuate such a result. It follows that so much of the statute as precedes the provision affecting those who "shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign," is void.

It was under that portion of the statute which we hold the constitution prohibits that McPike was convicted, and it follows that the order of the appellate division should be affirmed.

Gray, O'Brien, Haight, Martin, Cullen and Werner, JJ., concur.

Order affirmed.

A Statute absolutely prohibiting the use of a likeness of the nation flag or emblem for any commercial purpose, or as an advertising medium, is pronounced unconstitutional in Ruhstrat v. People, 185 Ill. 133, 76 Am. St. Rep. 30.

WOODWARD v. MUTUAL RESERVE LIFE INSURANCE COMPANY.

[178 N. Y. 485, 71 N. E. 10.]

JUDGMENT OF SISTER STATE.—Want of Jurisdiction may be Shown by Extrinsic Evidence, even against the recital of a judgment record of a sister state, that defendant was served or appeared by attorney or of any other jurisdictional fact. (p. 520.)

FOREIGN CORPORATIONS.—A State has the Right to Exclude a Foreign Corporation from Doing Business Therein or may permit it to transact business with its citizens and fix the terms and conditions on which this may be done. (p. 521.)

FOREIGN INSURANCE CORPORATIONS.—Effect of Attempted Withdrawal from the State.—If a foreign corporation complies with the conditions of a statute of the state to become entitled to do business therein and commences issuing policies, its obligations toward its policy-holders in that regard is precisely the same as if its promises to the state had been incorporated in the policies, and therefore, whether it continues to do business in the state or not, policy-holders may commence actions by service of process upon the Secretary of State, in the manner and under the circumstances designated in the state statute. (pp. 521, 522.)

FOREIGN CORPORATIONS.—Statutes Changing Officers of the State on Whom Service of Process may be Made.—If, after a foreign corporation commences doing business in a state, and, as required by the statute, has appointed an agent upon whom, or on the Secretary of the State, service of process may be made, such statute is amended so as to require such corporation to execute an instrument appointing the insurance commissioner as its agent on whom process against it may be served, and such an instrument is executed after such amendment, service of process thereafter made on such commissioner gives the court jurisdiction of such corporation. The power of the legislative department of the state and the corporation to accomplish such an object cannot be doubted. (pp. 522, 523.)

FOREIGN CORPORATIONS.—Jurisdiction of State Courts Over.—Though a State Court Practically Drives a Foreign Corporation Out of the State, it cannot affect rights already secured to policy-holders who had entered into contract relations with the corporation. If it files a revocation of its designation of the insurance commissioner as a person on whom service of process against it may be made, such revocation cannot operate as against pre-existing policy-holders, and a judgment in their favor founded on service of process on him is valid and enforceable in another state. (p. 524.)

Richard H. Mitchell and Rollin M. Morgan, for the appellant.

Frank R. Lawrence, George Burnham, Jr., and Gordon T. Hughes, for the respondent.

⁴⁸⁷ PARKER, C. J. This cause was submitted to the appellate division on an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure. Plaintiff, a resident of North Carolina, claims a personal judgment against defendant, an insurance corporation of this state, for a sum exceeding three hundred dollars. Plaintiff claims under a judgment entered by a court of general jurisdiction of North Carolina, August 20, 1900.

The federal constitution provides that: "Full faith and credit shall be given in each state to the public acts, records ⁴⁸⁸ and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof" (U. S. Const., art. 4, sec. 1), and Congress has prescribed that they shall have the same effect in every court within the United States as they have by law or usage in the courts of the state in which they originate: U. S. Rev. Stats., p. 170, sec. 905. It is well settled by our decisions that although a judgment of a court of general jurisdiction of a sister state is entitled to the benefit of the presumption of jurisdiction which exists in favor of judgments of our own courts, yet want of jurisdiction may be shown by extrinsic evidence, and even a recital in the judgment record that defendant was served or appeared by attorney or of any other jurisdictional fact, is not conclusive, and may be contradicted by extrinsic evidence: *Ferguson v. Crawford*, 70 N. Y. 253, 257, 26 Am. Rep. 589; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

Defendant attacks the North Carolina judgment on the ground that jurisdiction of defendant was not acquired by service of process upon it. The action was for breach of a contract of insurance made between plaintiff and defendant while the latter was lawfully engaged in the business of insurance in that state. Defendant, as required by the statutes of the state, had appointed an attorney upon whom process could be served. After defendant had been in business in the state a number of years such legislation was passed regulating the conduct of insurance corporations as to cause defendant to withdraw from the state. It discontinued its agencies, and attempted to revoke its designation of the insurance commissioner of the state as the person upon whom process could be served. In the North Carolina action the process was served upon the insurance commissioner after this attempted revocation.

and we are to inquire whether that service gave that court jurisdiction of defendant.

Defendant commenced doing business in North Carolina under a statute passed in 1883. One section of that statute provides that the Secretary of State may issue licenses to do ^{any} insurance business, but that the applicant shall file a certificate appointing a general agent and stipulating "that so long as there may be any liability on the part of the applicant, under any contract entered into in pursuance of any law concerning insurance, any legal process affecting the applicant may be served in his absence on such general agent, or on the Secretary of State, and when so served shall have the same effect as if served personally on such applicant in this state."

Now, the state of North Carolina had the right to exclude defendant from doing business in that state. It had the right to permit it, as it did, to transact business with its citizens, and to fix the terms and conditions upon which it should be done. This court speaking upon that subject in *People v. Fire Assn. of Philadelphia*, 92 N. Y. 311, 327, 44 Am. Rep. 380, says: "Foreign corporations, artificial beings, the product of a law not our own, have no constitutional right to pass their own borders and come into ours. The federal constitution has neither guarded nor secured any such right. We may exclude absolutely, and in that power is involved the right to admit upon such conditions as we please. . . . While they stand at the door bargaining for the right to come within, they may decline to come, but cannot question our conditions if they do."

As we have seen, the legislature of North Carolina provided that as a condition of doing business in the state an insurance company must stipulate that any legal process affecting the applicant might be served upon its general agent or upon the Secretary of State, with the same effect as if served personally, and this provision was not limited to the period during which the company should continue to do business within the state, but was to be effectual so long as there should remain "any liability on the part of the applicant under any contract entered into in pursuance of any law concerning insurance."

When defendant commenced issuing policies in that state after having complied with the conditions of the statute, its obligations toward its policy-holders in that regard were precisely ^{the} the same as if its promises to the state had been incorporated in the policies, and thereafter, whether the company con-

tinued to do business in the state or not, policy-holders could commence actions by service of process upon the Secretary of State.

Process was not served on the Secretary of State, however, owing to an amendment of the statute, and action taken thereunder by defendant; and it is argued that the action of the legislature was without authority to affect the contract existing between plaintiff and defendant which, as we have seen, when read in connection with the statute and defendant's action thereunder, provided that an action could be brought on the contract against defendant by serving the Secretary of State.

In March, 1899, a new department of the state government of North Carolina was created, known as the insurance department. Supervision and control of domestic and foreign insurance companies and the regulation of the insurance business was transferred to that department, the head of which was the commissioner of insurance. The act creating that department provides that no foreign insurance corporation shall do business in the state until "it shall, by duly executed instrument filed in his office, constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or legal proceedings against it may be served, and therein shall agree that any lawful process against it which may be served upon its said attorney shall be of the same force and validity as if served on the company, and the authority thereof shall continue in force irrevocable, so long as any liability of the company remains outstanding in this commonwealth." The legislature intended to relieve the Secretary of State of all connection with the insurance business and place it in the hands of the insurance commissioner.

This defendant—in obedience to the statute, and apparently desiring to continue to do business in the state—filed with the commissioner of insurance a power of attorney, conforming ⁴⁹¹ entirely with the requirements of the statute, and stipulating that "all lawful processes in any action or legal proceeding against it" might be served upon said commissioner "subject to, and in accordance with, all the provisions of the laws of the state of North Carolina now in force, and such other laws as may hereafter be enacted in relation thereto, and . . . shall be of the same force and validity as if served upon this company, and this authority shall continue in force irrevocably

so long as any liability of said company remains outstanding in the said state." Thereafter defendant, for a brief period at least, continued to solicit insurance risks within the state.

Now, as we have said, prior to the passage of this act, and the execution of this instrument, policy-holders had the right to institute actions by service of process upon the Secretary of State; but it was within the power of the legislature of the state and defendant company to substitute another as the person upon whom process should be served. The state selected the insurance commissioner, and defendant accepted the substitute, and evidenced its acceptance, as the statute provided, by the execution and filing of an authority for the service of process upon the commissioner, stipulating therein that the authority should continue in force as long as any liability of the company remained outstanding in the state. This latter clause added nothing to the burdens already resting upon defendant as to policies issued by it, for, as we have seen, the statute under which defendant commenced to do business in the state required a stipulation for service of legal process upon the Secretary of State so long as there should remain any liability under any contract. As to the contracts already in existence, then, such as plaintiff's, the effect of the provisions of the later statute, and defendant's action thereunder, was to substitute the insurance commissioner for the Secretary of State as the party upon whom process should be served.

The power of the legislative department of the state government and defendant to accomplish such a result cannot be doubted. The state had the right to make conditions ⁴⁹² upon which defendant should engage in business in the state. It had the power to add conditions after defendant commenced to do business, which could be complied with, or defendant could leave the state, as it chose. The condition that the insurance commissioner be substituted for the Secretary of State was promptly accepted by defendant, which thereafter continued to do business in the state. And as these conditions were imposed by the state and accepted by defendant for the benefit of the policy-holder, he could take advantage of them.

In *Little v. Banks*, 85 N. Y. 258, a citizen recovered for himself a judgment for damages stipulated in a contract between defendant and state officers authorized to make it by a statute which aimed to secure to the public the reports of decisions of the court of appeals at a reasonable rate, and to that end pro-

vided for the publication thereof "by contract, to be entered into with the person or persons who shall agree to publish and sell the said reports on terms the most advantageous to the public." A contract was made with Banks, a book publisher, fixing the contract price per volume to every other law-book seller in New York City and Albany applying therefor in at least a specified quantity. And the contract further provided that for any failure of the contractor "to keep on sale, furnish and deliver" the volumes as agreed, he should "forfeit and pay the sum of one hundred dollars hereby fixed and agreed upon, not as a penalty, but as liquidated damages to be sued for and recovered by the person or persons so aggrieved." Little, a bookseller, applied to defendant, the contractor, for the requisite number of volumes, tendering the stipulated price, which defendant refused to accept. Little then commenced an action to recover one hundred dollars for each refusal, and the recovery had by him in the trial court was affirmed in the general term, and finally in this court. Therefore, it is held in that case, in effect, that a citizen can enforce an agreement made for his benefit by the state, and the principle is applicable not only to the first situation, created by defendant's acceptance of the terms imposed ⁴⁹³ by the statute of 1883—which assured to plaintiff, and all others to whom defendant issued policies prior to the act of 1899, the right to commence action against defendant by service of process on the Secretary of State—but also to the substitutional provision of the act of 1899, and its acceptance by defendant, evidenced by its designation of the insurance commissioner as the person on whom process might be served.

True, a subsequent statute practically drove defendant out of the state, but that statute could not affect the rights already secured to those who had entered into contract relations with defendant prior to that time.

The conclusion we have reached agrees with that of the courts of North Carolina (*Briggs v. Mutual Reserve Fund Life Assn.*, 128 N. C. 5, 37 S. E. 955,) and with the supreme court of the United States: *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 158, 23 Sup. Ct. Rep. 707, 47 L. ed. 987.

The judgment should be reversed, and judgment for plaintiff granted on the submission, with costs.

Gray, Martin, Cullen and Werner, JJ., concur.

O'Brien, J., dissents.

Haight, J., absent.

Judgment reversed, etc.

Service of Process on foreign corporations is discussed in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. etc. Co.*, 85 Am. St. Rep. 926-938. That service may be made upon an insurance commissioner after a foreign insurance company has withdrawn from the state or after its right to do business therein has been revoked, see *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Magaffin v. Mutual Reserve Assn.*, 87 Minn. 260, 94 Am. St. Rep. 699.

A *Foreign Corporation* may be permitted to do business in a state, or it may be entirely excluded therefrom. If a permit is granted, it may be under such conditions and regulations as the state chooses to impose: *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912; *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459. And it may be revoked: *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BROWN v. HAMILTON.

[135 N. C. 10, 47 S. E. 128.]

WILLS—Construction of Devise.—A devise by a testator of his lands south of a certain line, "containing, by estimation, two hundred acres," carries with it lands subsequently purchased by him south of such line. (p. 527.)

Hammer & Spence, for the plaintiffs.

O. L. Sapp, for the defendants.

¹⁰ **CLARK, C. J.** The testator devised to the defendant, his daughter, "all that tract or parcel of land which lies south of the line beginning at the northeast corner of K. L. Win-ningham's land and running thence east to the Wiley Cox line, containing, by estimation, two hundred acres." In his will he divided and devised the rest of his land, marking it out by boundaries in the same way, to his other three children. The will was executed May 14, 1897, at which time the testator owned three contiguous tracts south of said line, aggregating about two hundred and fifty acres. On September 9, 1898, the testator acquired sixty-six and one-half acres more touching in its whole length the said two hundred and fifty acres and on the south thereof, and died September 25, 1900. This is a pe-tition by the other children alleging that the testator died in-testate as to said sixty-six and one-half acres and asking that it be sold for partition.

It is provided by the Code, section 2141, that a will ¹¹ shall speak as of the death of the testator. It is also well settled that the presumption is against one's dying intestate as to any part of his estate. Of course these rules are subject to the

stronger rule that the intent of the testator, clearly expressed, shall govern. But here the will shows an intent on its face to specifically dispose of all the testator's property. The testator knew that he had given by his will all his land south of a designated line to his daughter, and when he bought this land south of said line the following year he also knew that it fell within the devise to his daughter (the defendant), and if he had wished it to be taken out of such devise he would have added a codicil. On the contrary, though he lived more than two years after the purchase of said land, he made no change in his will. We attach no importance to the argument that the words used "all that tract south of said line," for when the sixty-six and one-half acres adjoining were bought it became a part of the land south of the line. The said tract at the date of the will consisted of three contiguous tracts but were treated as one. Laws of 1814, chapter 88, section 3, now the Code, section 2141, requires that the will shall be construed "to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intent shall appear by the will," and none here appears. A case very much in point is *In re Champion*, 45 N. C. 246. *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106, is not in point, for there the subsequently acquired land did not come within the terms of the specific devise, and, besides, there was a residuary clause. The reference to the number of acres (two hundred acres) cannot control the boundaries described in the deed: *Lyon v. Lyon*, 96 N. C. 439, 2 S. E. 41. There is no doubtful boundary to render the number of acres material to be considered, as in *Cox v. Cox*, 91 N. C. 256.

Error.

In Construing a Will the intention of the testator governs: *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287; *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234. When a will is made, the presumption is against partial intestacy: *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287; *Phillips' Estate*, 205 Pa. St. 504, 97 Am. St. Rep. 743; *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468. The general rule is that a will speaks from the death of the testator: *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295. See, too, *Cheever v. North*, 106 Mich. 590, 58 Am. St. Rep. 499; *Rudolph v. Rudolph*, 207 Ill. 266, 99 Am. St. Rep. 211. By the common law, a will passes only such real estate as the testator owned at the time of its execution, but this rule has been changed in many jurisdictions, so that after-acquired realty passes if such appears to be the testator's intention: *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117; *Raines v. Barker*, 13 Gratt. 128, 67 Am. Dec. 762. As to the sufficiency of the description of the land in a devise, see *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287, and cases cited in the cross-reference note thereto.

DRUM v. MILLER.

[135 N. C. 204, 47 S. E. 421.]

SCHOOLS—Authority of Teacher—Negligence.—An act done by a school teacher, in the exercise of his authority to correct his pupil, and not prompted by malice, is not actionable, though it may cause a permanent injury, unless a person of ordinary prudence could have reasonably foreseen that a permanent injury of some kind would naturally or probably result from the act. (p. 529.)

TORTS—Negligence.—If a willful wrong or a negligent act is committed which produces an injury, the wrongdoer is liable, provided, in the latter case, he could have foreseen that harm might follow as a natural and probable result of his act. (pp. 533, 534.)

SCHOOLS—Liability of Teacher for Negligent Injury to Pupil.—In order to render a school teacher liable for permanent injury inflicted on a pupil wrongfully in an attempt to correct him, it is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen, but it is sufficient if, by the exercise of reasonable care, the teacher might have foreseen that some injury would result from his act. (p. 534.)

SCHOOLS—Liability of School Teacher for Injury to Pupil.—A school teacher is liable if he inflicts personal, permanent injury upon a pupil in attempting to enforce the discipline of his school, and in so doing fails to exercise ordinary care, and the injury is the natural and probable result of his negligence which he should have foreseen in the light of surrounding circumstances, and in the exercise of ordinary care. (p. 535.)

Defendant was a teacher in a public school and the plaintiff was his pupil. While plaintiff was reciting one of his lessons his attention was attracted by some disturbance in another part of the schoolroom, and when he turned his head to see what was doing, the defendant threw a lead pencil at him to attract his attention. As plaintiff turned again the pencil thus thrown struck him in the eye, inflicting a serious wound, and causing partial, if not total, blindness. Judgment for defendant and plaintiff appealed.

T. M. Hufham, for the plaintiff.

Self & Whitener, for the defendant.

²⁰⁷ WALKER, J. Several exceptions were taken by the plaintiff to the judge's charge, only two of which we deem it necessary to notice. One of these ²⁰⁸ exceptions is based upon the plaintiff's contention that if he was permanently injured by the act of the defendant he is entitled to recover, whether that act was the proximate cause of the injury or not, or could or could not reasonably have been foreseen. We cannot

agree with the plaintiff in this contention. It is undoubtedly true that a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously or inflicts a permanent injury, but he has the authority to correct his pupil when he is disobedient or inattentive to his duties, and any act done in the exercise of this authority and not prompted by malice is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act. There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful or is, at least, a willful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen. Cooley, in his work on Torts, second edition, page 74, states the rule thus: "1. In the ²⁰⁰ case of any distinct legal wrong which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. 2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause. 3. If the original act was wrongful, and would naturally, according to the ordinary course of events,

prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Pollock, in his treatise on Torts, pages 14 to 35, discusses with great clearness and apt illustration this subject of proximate cause in its relation to the liability of persons for civil wrongs, and the following general principles (the most of them expressed in his words) may be gathered therefrom. A tort is an act or omission (not being merely a breach of duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in the following ways: 1. It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm and does cause ²¹⁰ the harm complained of; 2. It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting; 3. It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented; 4. It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. A special duty of this kind may be (1) absolute, (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk; in others he warrants only that all has been done for safety that reasonable care can do.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience there is some default in the mere fact

that the law is disobeyed (at any rate, a court of law cannot admit discussion on that point), and the defaulter must take the consequences.

"Then we have the general duty of using due care and caution. What is due care and caution under given circumstances has to be worked out in the special treatment of negligence. Here we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, ²¹¹ and prudence." In cases of tort the primary question of liability may itself depend, and it often does depend, on the nearness or remoteness of the harm or injury, and the liability itself must be founded on an act which is the immediate cause of the harm or injury to a right, the rule of the law being that the proximate, and not the remote, cause is to be regarded. For, says Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree." For the purpose therefore of civil liability, in the law of torts, those consequences and those only are deemed immediate and proximate or natural and probable which a person of average competence and knowledge, being in the like case of a person whose conduct is in question and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was immediate or not does not matter. That which a man actually foresees is to him, at all events, natural and probable: Pollock on Torts, 21. In the case of willful or intentional wrongdoing we have an act intended to do harm, and harm done by it and the inference of liability from such an act may seem a plain matter under the general rule of liability, and assuming that no just cause of exception to it is present, "It is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and having begun an act of wrongful mischief he cannot stop the risk at his pleasure nor confine it to the precise objects he laid out, but must abide it fully and to the end." The principle is commonly expressed in the maxim that a man is presumed ²¹² to intend the natural consequences of his acts. The

doctrine of natural and probable consequences is most clearly illustrated, however, in the law of negligence, for there the substance of the wrong itself is failure to act with due foresight. It has been defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," and, for the purpose of civil liability, the definition is sufficient and adequate, perhaps, to indicate the kind of act, or failure to act, which may be regarded as the immediate or proximate cause of any consequent harm or injury, for the prudent man to whose ideal behavior we are to look as the true standard of duty will be guided by a reasonable estimate of probability, and will not neglect what he can forecast as probable, but will order his precaution by the measure of what appears likely in the known cause of things. If he fails so to order his conduct and injury results, he is justly held to be the responsible author of it.

While, as we have said, a person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could have reasonably foreseen or expected as the natural and probable consequence of his act or his omission of duty, it must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. "It is not an essential element of negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person. The improbability of injury to another is a circumstance that might be taken into account, but which is not conclusive of the question. If, however, no reasonable person could have anticipated that injury ²¹⁸ to another might ensue, we think that there could be no negligence. It is certainly not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced": 1 Shearman and Redfield on Negligence, 4th ed., sec. 21.

It is quite sufficient to satisfy the principle and to bring any case within its operation that the party complained of should be able, in the exercise of the care of a man of ordinary prudence, to foresee that harm or injury will result without reference to the particular kind. If he had or should have had this

foresight, he is in no better case than the man who intends to do and actually does harm, so far as liability for the natural and probable consequence of his act or conduct is concerned. We believe this to be the doctrine to be gathered from the teachings of the text-writers and the decided cases, and the principle that a man is liable for those consequences only which an ordinarily prudent man can foresee as likely to flow from his acts, is, when thus restricted and understood, undoubtedly the correct one. It seems to be in consonance with a just appreciation of the causal connection which should exist between the act and the consequence of it, in order to create civil liability. There is no sound or valid reason, so far as we are able to see, why the very injury that was inflicted by the wrongful or negligent act should have been foreseen, for if the person complained of actually intended any harm to him who was injured by his act, it is conceded that he is liable, without regard to the particular nature of the injury, and there is no way of distinguishing such a case from one in which an act is negligently done which the party doing it could well see at the time would cause harm, or injury in its general sense, to another. There may be a difference in degree but not in principle. In the one case there is an actual intention ²¹⁴ while in the other there is an implied intention, which the law will not ordinarily permit to be contradicted, because it is a just and reasonable rule, as it is a maxim of the law, that a person is presumed to intend that which is the natural consequence of his act. When, therefore, a willful wrong is committed or a negligent act which produces injury, the wrongdoer is liable, provided in the latter case he could have foreseen that harm might follow as a natural and probable result of his act, for if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume

that he intended to do that which is the natural result of his conduct in the one case, and, in the other, he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities ²¹⁵ cited to support it, in 21 American and English Encyclopedia of Law, second edition, page 487: "In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

It is not essential, therefore, in a case like this one, in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the party sought to be charged with liability for the negligence should have foreseen by the exercise of ordinary care that some mischief would be done: 1 Thompson's Commentaries on Negligence, sec. 59. In determining whether due care has been exercised in any given situation of the party alleged to have been negligent, reference must be had to the facts and circumstances of the case and to the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct if he had been similarly situated: *Hill v. Windsor*, 118 Mass. 251.

Applying these general principles to the case in hand, we find that the defendant occupied that relation toward the plaintiff, who was his pupil, which entitled him to use such means for the purpose of correction and discipline as in his

judgment were required under the circumstances, provided that he neither acted from malice nor inflicted permanent injury: *State v. Pendergrass*, 19 N. C. 365, 31 Am. Dec. 416; *State v. Long*, 117 N. C. 790, 23 S. E. 431. The law on this subject is thus well stated: "It is the duty of the teacher to enforce the rules and regulations adopted for the government of a school and to maintain discipline in the school, and in order to maintain discipline and compel obedience to any lawful regulation, the teacher may inflict corporal punishment upon a pupil, since the teacher for the time being stands, to some extent, at least, in loco parentis, and has such a portion of the powers of the parents delegated to him, namely, that of restraint and correction, as may be deemed necessary to answer the purposes for which he is employed": Am. & Eng. Ency. of Law, 2d ed., p. 244. And by another writer it is thus stated: "The teacher has the power to enforce obedience to the rules and to his commands. One of the means recognized by the law is corporal chastisement. He may thereby inflict temporary pain, but not seriously endanger life, limbs, or health, or disfigure the child, or cause any other permanent injury. He cannot lawfully beat the child, even moderately, to gratify his own evil passions; the chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree; it is impossible he should inflict it without": *Bishop on Noncontract Law*, sec. 596, p. 269.

If when the case is again tried the jury find that the defendant acted maliciously, he will of course be liable to the plaintiff for the consequent injury and damage, as was fully and clearly explained in the charge of the judge at the last trial; but if he inflicted a permanent injury in attempting to enforce the discipline of his school, and in so doing failed to exercise ordinary care, he will still be liable to the plaintiff if the jury further find that the injury was ²¹⁷ the natural and probable result of his negligence, and that the defendant, in the light of the attending circumstances and in the exercise of ordinary care, ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act.

The court had charged the jury correctly, in accordance with the foregoing principles, until it gave the instruction contained

in the defendant's third prayer. By that instruction the jury, before they could return a verdict for the plaintiff, were required to find that the defendant was at the time able to foresee, by the exercise of ordinary care, not only that injury would result but that the particular injury which was received by the plaintiff would be the natural and probable consequence of his act. It is very likely that this instruction had great weight with the jury in deciding the case against the plaintiff, and we can well see how he might have been, and no doubt was, seriously prejudiced thereby. The language of Gaston, J., in *State v. Pendergrass*, 19 N. C., at page 367, 31 Am. Dec. 416, will be appropriate in this connection, as he states the rule of responsibility in such cases with his usual clearness: "We think that the instruction on this point should have been that unless the jury could clearly infer from the evidence that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think, also, that the jury should have been further instructed that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet if it did not produce nor threaten lasting mischief it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty, ²¹⁸ according to her sense of right, but, under the pretext of duty, was gratifying malice."

There the liability was made to depend upon the question whether the act charged to have been negligent threatened lasting injury. We can add nothing to what is so well said by that wise and learned judge.

There was error in giving the defendant's third prayer for instruction which entitles the plaintiff to another trial. We cannot consider this error as cured by the other parts of the charge, though in themselves correct: *Edwards v. Atlantic etc. R. R. Co.*, 129 N. C. 78, 39 S. E. 730, 132 N. C. 101, 43 S. E. 585; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Lynchburg etc. R. R. Co.*, 115 N. C. 662, 20 S. E. 480. The rule in this respect is well settled in those cases.

New trial.

Douglas, J., concurs in result arguendo.

POWERS AND LIABILITIES OF SCHOOL TEACHERS IN RELATION TO PUPILS.**I. Authority of Teacher to Punish Pupil.****a. As Substitute for Parent, 537.****b. Right of Teacher Generally to Inflict Reasonable Punishment, 538.****II. Right to Make and Enforce Rules, 539.****III. Power to Suspend or Expel Pupil, 540.****IV. Liability in Damages for Excessive Punishment, 540.****V. Criminal Liability.****a. Excessive Punishment, 541.****b. Punishment Inflicted Through Malice, 543.****c. Liability of Teacher, how Determined, 543.****d. Presumption and Burden of Proof, 544.****I. Authority of Teacher to Punish Pupil.**

a. As Substitute for Parent.—“It is not easy to state with precision the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents is to train up and qualify their children for becoming useful and virtuous members of society. This duty cannot be performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits, and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction when he shall believe it to be just and necessary. The teacher is the substitute for the parent, is charged in part with the performance of his duties, and in the exercise of these delegated duties is invested with his power”: *State v. Pendergrass*, 2 Dev. & B. 365, 31 Am. Dec. 416; *State v. Burton*, 45 Wis. 150, 30 Am. Rep. 706. “The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to punish his child. But that is true only in a limited sense. The teacher has no general right of chastisement for all offenses, as has the parent. The teacher’s right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher. But within those limits, a teacher may exact a compliance with all reasonable demands, and may, in a kind and reasonable spirit, inflict corporal punishment upon a pupil for disobedience. This punishment should not be either cruel or excessive, and ought always to be apportioned to the gravity of the offense and within the bounds of moderation. But, plainly, when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, as in the case of a parent under similar circumstances, and where no improper weapon has been employed, the presumption will be, until the contrary is made to appear, that what was done was rightly done. Subject to these general rules, the teacher’s right to inflict, and the duty of inflicting, cor-

poral punishment upon a pupil, and the reasonableness of such a punishment when imposed, must be judged of by the varying circumstances of each particular case": *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341. "The better doctrine of the adjudged cases, therefore, is, that the teacher is within reasonable bounds the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction, with a proper instrument, in cases of misconduct which ought to have some reference to the character of the offense, the sex, age, size, and physical strength of the pupil. When the teacher keeps within this circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits, and hence the parent or teacher is often said, *pro hac vice*, to exercise judicial functions": *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 33, 7 South. 268.

b. Right of Teacher Generally to Inflict Reasonable Punishment. It is everywhere admitted that a school teacher has a right to inflict reasonable punishment upon a pupil, for misconduct, by whipping or otherwise, for the purpose of maintaining the discipline and efficiency of the school. The law in all instances confides to teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible, either civilly or criminally, unless the punishment inflicted is clearly excessive, or is inflicted merely to gratify malice or evil passions: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268; *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341; *Commonwealth v. Randall*, 4 Gray, 37; *Clasen v. Pruhs* (Nev.), 95 N. W. 640; *Haycraft v. Grigsby*, 88 Mo. App. 354; *State v. Pendergrass*, 2 Dev. & B. 365, 31 Am. Dec. 416; *Bolding v. State*, 23 Tex. App. 172, 4 S. W. 579; *Hathaway v. Rice*, 19 Vt. 102; *Stephens v. State*, 44 Tex. Cr. 67, 68 S. W. 281. Within the sphere of his authority the school teacher is the judge, and vested with a large discretion, as to when correction of the pupil is required, and of the degree of correction necessary: *State v. Thornton* (N. C.), 48 S. E. 602. A school teacher may always enforce discipline by the imposition of reasonable corporal punishment upon his pupil. He may determine when and to what extent punishment is necessary and he is not liable in any manner for an error of judgment when he has acted in good faith and without malice: *Commonwealth v. Randall*, 4 Gray, 36; *Heritage v. Dodge*, 64 N. H. 297, 9 Atl. 722; *Fox v. People*, 84 Ill. App. 270; *State v. Pendergrass*, 2 Dev. & B. 365, 31 Am. Dec. 416; *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341. The fact that a pupil is over twenty-one years of age does not relieve him of the duty of obedience, nor restrict the schoolmaster's authority to punish him: *State v. Mizner*, 45 Iowa, 248, 24 Am. Rep. 769.

And if such pupil in school hours intrudes himself into the desk assigned to the teacher, and refuses to leave it upon his request, he may be removed by the master, who for that purpose may use such force, and call to his assistance such aid, as is necessary to accomplish that object: *Stevens v. Fassett*, 27 Me. 266. And if a pupil, seventeen years of age, brings a pistol to school and threatens to kill or shoot his teacher, the latter is entitled to use such force as is necessary to disarm his pupil, and punish him for his actions: *Metcalf v. State*, 21 Tex. App. 174, 17 S. W. 142. A school teacher may inflict reasonable punishment upon his pupil without liability, but in the exercise of the power of corporal punishment, he must not make such power a pretext for cruelty or oppression and the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, must be distinguished with the kindness, prudence and propriety which become the station of the teacher: *Cooper v. McJunkin*, 4 Ind. 290. The punishment inflicted by a teacher upon a pupil should not be cruel or excessive, and ought always to be apportioned to the gravity of the offense, and within the bounds of moderation, and when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, and the reasonableness of the punishment determined by the varying circumstances of the particular case: *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341. In inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion and be governed, as to the mode and severity of the punishment by the nature of the offense, the age, size, and apparent powers of endurance of the pupil: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268; *Commonwealth v. Randall*, 4 Gray, 36; *Dowlen v. State*, 14 Tex. App. 66. If a parent has forbidden the child to pursue a certain study in school, and this fact is known to the teacher, he is not authorized to inflict corporal punishment upon the child for the purpose of compelling it to pursue the study so forbidden by the parent: *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471. If a teacher is requested when taking charge of a school, to be more strict than a former teacher in enforcing discipline among his scholars, this does not vest in him any more authority by reason thereof than he otherwise would have possessed: *State v. Thornton* (N. C.), 48 S. E. 602.

II. Right to Make and Enforce Rules.

A school teacher has a right to make, and require obedience and submission to, proper and reasonable rules and to inflict punishment for disobedience of them; but in inflicting corporal punishment for an infraction of such rules, the teacher must be governed, as to the mode and severity of it, by the nature of the offense, and by the age, size, and physical condition of the pupil: *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Fertich v. Michener*, 111 Ind.

472, 60 Am. Rep. 709; *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171. If the pupil has been habitually refractory and disobedient in breaking school rules the teacher may, in punishing him for a particular offense, take into consideration his habitual disobedience: *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841. Reasonable chastisement inflicted by a school teacher, for a violation of a reasonable rule of the school, even though such violation did not occur at the schoolhouse nor during school hours, does not render the teacher liable either civilly or criminally: *Hutton v. State*, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122. Thus, a school teacher may make a rule forbidding scholars from quarreling and using profane language on their way home from school, and punish them for disobedience of it: *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387. "Teachers have the right, the same as parents, to prescribe reasonable rules for the government of the children under their charge, and to enforce by moderate correction and restraint obedience to such rules. This authority of a teacher over his pupils is not, in our opinion, necessarily limited to the time when the pupils are at the schoolroom, or under the actual control of the teacher. Such authority extends, we think, to the prescribing and enforcement of reasonable rules and requirements, even while the pupils are at their homes": *Holding v. State*, 23 Tex. App. 175, 4 S. W. 579. Thus, a teacher has a right moderately to chastise a pupil for refusing to render an excuse for absence from school without leave, in violation of a rule of the school: *Danenhoffer v. State*, 69 Ind. 295, 35 Am. Rep. 216.

III. Power to Suspend or Expel Pupil.

School teachers stand in loco parentis as to the government of their schools, and have inherent power to suspend or expel pupils for cause, and without unnecessary force, and a teacher who rightfully expels or suspends a pupil cannot be compelled to reinstate him: *State v. Burton*, 45 Wis. 150, 50 Am. Rep. 706. Nor is he liable in damages therefor: *Kidder v. Chellis*, 59 N. H. 473; *Sewell v. Board of Education*, 29 Ohio St. 89. Expulsion from school is the proper remedy for persistent disobedience; *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171. If, however, a pupil is wrongfully expelled, the teacher is liable in damages for such wrongful expulsion: *Roe v. Deming*, 21 Ohio St. 666.

IV. Liability in Damages for Excessive Punishment.

A school teacher is liable in damages for imposing excessive punishment upon a pupil, and what is excessive punishment in such case is such as the general judgment of reasonable men upon reflection would call excessive: *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818, 7 Atl. 273. Thus, if the teacher strikes the pupil a great many violent blows with a club, and with a rawhide, and with his fist, and shakes him with great violence, and throws him down and then harshly and brutally kicks him and strikes him

other violent blows, thus wounding him and tearing his clothes, the teacher is guilty of excessive violence, and must respond in damages therefor: *Hathaway v. Rice*, 19 Vt. 102. And if excessive flogging or other punishment is inflicted upon a pupil, the teacher and all who aid, abet, or encourage him are answerable in damages, regardless of whether the motive which prompted him or them was malicious or not: *Haycraft v. Grigsby*, 88 Mo. App. 854. A schoolmaster is liable in damages for an excessive punishment of a pupil, even though he acted in good faith and without malice, and considered it necessary and not excessive: *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

V. Criminal Liability.

a. **Excessive Punishment.**—A school teacher has the right to moderately chastise a pupil or inflict reasonable corporal punishment for disobedience or bad behavior without answering criminally therefor. In other words, a teacher has the right to inflict punishment upon a pupil in a reasonable manner and with a proper spirit, and he can be held liable for an assault and battery only in the event that the punishment inflicted was either cruel or excessive and beyond the bounds of moderation, considering all of the circumstances of the case: *Danenhoffer v. State*, 69 Ind. 295, 35 Am. Rep. 216; *Marlsbary v. State*, 10 Ind. App. 21, 37 N. E. 558; *State v. Mizner*, 45 Iowa, 248, 24 Am. Rep. 769; *Kidder v. Chellis*, 59 N. H. 473; *Wilbur v. Berry*, 71 N. H. 619, 51 Atl. 904. If a school teacher, in the exercise of his authority to correct disobedience in a pupil, grossly abuses his power, he is punishable criminally therefor: *State v. Thornton* (N. C.), 48 S. E. 602. A schoolmaster may enforce obedience to his reasonable rules by the use of corporal punishment when necessary, but he must not chastise wantonly, excessively, or without cause and the chastisement must be proportionate to the offense and within the bounds of moderation, or the schoolmaster will be liable for an assault and battery: *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774. The same rule in effect is laid down in *Marlsbary v. State*, 10 Ind. App. 21, 37 N. E. 558; *Commonwealth v. Randall*, 4 Gray, 36; *Hathaway v. Rice*, 19 Vt. 102. A school teacher is never authorized to inflict excessive chastisement upon a pupil in his school, nor to chastise for a specific offense which the pupil does not understand, nor to chastise for the refusal of the pupil to study a branch from which his parent has excused him, and if the teacher does any of these things, he is punishable criminally: *State v. Mizner*, 50 Iowa, 145, 52 Am. Rep. 128; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471.

The legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation which it implies, and it does not follow that a chastisement was cruel or oppressive because pain was produced or abrasion of the skin resulted from a switch used by the teacher: *Vanvactor v. State*, 118 Ind.

276, 3 Am. St. Rep. 645, 15 N. E. 341. A rule requiring pupils to pay for school property which they wantonly and carelessly break or destroy is not reasonable, and the teacher is criminally liable for chastising them for a breach of such rule: *State v. Vanderbilt*, 116 Ind. 11, 9 Am. St. Rep. 820, 18 N. E. 266. If a teacher uses excessive force or inflicts such punishment upon a pupil as to produce a permanent injury, he is guilty of an assault: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268; *Fox v. People*, 84 Ill. App. 270; *State v. Boyer*, 70 Mo. App. 156; *State v. Long*, 117 N. C. 791, 23 S. E. 451; *State v. Pendergrass*, 2 Dev. & B. 365, 31 Am. Dec. 416. Thus, a schoolmaster is not justified in using a stick, nor his clenched fist applied in bruising the pupil, in further correcting him after he has been severely chastised, and has apologized. Such implements are not proper instruments of correction to be used on such occasion, and from their use there is ample room to imply unreasonable and immoderate correction, which will support a conviction of assault and battery: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268; *Hathaway v. Rice*, 19 Vt. 102. Usually if a teacher in punishing a pupil inflicts bruises by whipping, which remain for weeks after the chastisement, the correction is deemed excessive and the teacher guilty of assault and battery: *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128; *Howerton v. State* (Tex. Cr. App.), 43 S. W. 1018. In this connection the court, in speaking of the right to inflict corporal punishment in the schoolroom, said, in *Cooper v. McJunkin*, 4 Ind. 292: "In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. Where one or two stripes were at first intended, several usually follow, each increasing in vigor as the act of striking inflames the passions. This is a matter of daily observation and experience. Hence, the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too carefully nor guarded too strictly. The tender age of the sufferer generally forbids that its slightest abuses should be tolerated. So long as the power to punish corporally in school exists, it needs to be put under wholesome restrictions. Teachers, therefore, should understand that whenever correction is administered in anger and insolence, or in any other manner than in moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law in loco parentis, the courts must consider them guilty of assault and battery, the more aggravated and wanton in proportion to the tender years and dependent position of the pupil." This statement of the law was approved in *Gardner v. State*, 4 Ind. 632.

b. Punishment Inflicted Through Malice.—If a school teacher, in administering correction or punishment to pupils for disobedience or an infraction of the rules of the school, uses his authority as a cover for malice, he is amenable to the criminal laws, and the same result follows, if in imposing corporal punishment on a pupil his teacher is actuated by revenge, spite, or other evil passion: *State v. Thornton* (N. C.), 48 S. E. 602; *Bolding v. State*, 23 Tex. App. 172, 4 S. W. 580. It is a universal rule that if a school teacher inflicts punishment upon his pupil, not in the honest performance of his duty, but under the pretext of duty to gratify malice or other evil passion, he is guilty of an assault: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268; *Fox v. People*, 84 Ill. App. 270; *State v. Boyer*, 70 Mo. App. 156; *State v. Pendergrass*, 2 Dev. & B. 365, 51 Am. Dec. 416; *State v. Stafford*, 113 N. C. 635, 18 S. E. 256; *State v. Long*, 117 N. C. 791, 23 S. E. 431. There can be no such thing as reasonable punishment from a malicious motive. Hence, it would seem to follow that the teacher is criminally liable for the malicious punishment of a pupil, whether it be mild or excessive: *Haycraft v. Grigsby*, 88 Mo. App. 354.

c. Liability of Teacher, How Determined.—If the correction or punishment administered is not in itself excessive and therefore is not beyond the authority of the teacher, its legality or criminality must depend entirely upon the *quo animo* with which it is administered: *State v. Thornton* (N. C.), 48 S. E. 602. And this is a question of fact to be shown by the evidence and determined by the jury: *State v. Boyer*, 70 Mo. App. 156. Thus, on the trial of a school teacher for an aggravated assault upon his pupil, evidence of the effect of such punishment on the pupil, as well as the teacher's intent and purpose in inflicting it, is admissible, to enable the jury to regulate the punishment, if any, to be inflicted upon the teacher: *Kinnard v. State*, 85 Tex. Cr. Rep. 276, 60 Am. St. Rep. 47, 33 S. W. 234. It is a question for the jury to determine whether the punishment was inflicted maliciously and whether the instrument used was a proper one for the purpose of inflicting punishment on the pupil: *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

In determining whether the teacher in correcting a pupil has acted with reasonable judgment, or from malice and wickedness, the nature of the instrument for correction has a strong bearing and influence on the question of motive or intention: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268. But a big stick or a clinched fist are not proper instruments with which to inflict punishment, and from their use there is ample room to imply legal malice: *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 South. 268. The jury may infer malice from excessive punishment of the pupil: *State v. Thornton* (N. C.), 48 S. E. 602. The liability of the teacher is to be determined from the size of the rod used, the character of the wounds inflicted, and all the surrounding circumstances:

Smith v. State (Tex. Cr. App.), 20 S. W. 360. The nature of the offense, the mode and severity of the punishment therefor, and the age, sex, size and apparent physical powers of endurance of the pupil should all be considered by the jury: *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341; *Commonwealth v. Randall*, 4 Gray, 36.

d. **Presumption and Burden of Proof.**—A school teacher has the presumption of having only done his duty in support of his defense, in addition to the general presumption of his innocence in a prosecution against him for assault and battery in inflicting corporal punishment upon a pupil: *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341; *Marlsbary v. State*, 10 Ind. App. 21, 37 N. E. 558. The teacher is always the judge as to when correction of a pupil is required, and of the degree of correction necessary, and where he has exercised his judgment in whipping a pupil, the presumption is that he exercised it correctly: *State v. Thornton* (N. C.), 48 S. E. 602. The legal presumption always is that the chastisement inflicted upon the pupil by the teacher was proper: *Fox v. People*, 84 Ill. App. 270; *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774. And to warrant a conviction this presumption must be rebutted by showing that the punishment was excessive, inflicted through malice, or without any proper cause: *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774; *Dowlen v. State*, 14 Tex. App. 65, 66. The intent necessary to support a charge of assault and battery, in case of chastisement of a pupil by his teacher, may be inferred from the unreasonableness of the method adopted, or the excess of force employed, but the burden of proving such unreasonableness or excess is upon the prosecution: *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341. But the presumption that the punishment inflicted by the teacher upon the pupil was only such as was necessary is disputable, and may be rebutted and overcome by other evidence: *Haycraft v. Grigsby*, 88 Mo. App. 362; *Anderson v. State*, 3 Head, 55, 75 Am. Dec. 774. To rebut proof of malice in punishing a pupil, it is competent for the teacher to prove that the instrument used by him in inflicting such punishment was such as was generally used for such purposes by other teachers in the vicinity: *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

HINTON v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

[135 N. C. 514, 47 S. E. 474.]

INSURANCE, LIFE—Evidence—Fraud.—In order to avoid a life insurance policy for fraud, it is competent to show that such policy was procured by false representations as to the health of the insured, that the premium was not paid by him, but was paid by one who had no insurable interest in his life, and that the assignment of the policy to the person paying the premium was made without the knowledge or consent of the insurance company. (p. 549.)

INSURANCE, LIFE—Wager Policy.—A life insurance policy procured under an agreement between the insured and a person having no insurable interest in his life, that such person shall pay the premiums and receive the proceeds of the policy, is void as a wager policy. (p. 550.)

INSURANCE, LIFE—Assignment of Void Policy.—If an assignee of a life insurance policy cannot recover thereon because he has no insurable interest in the life of the insured, he cannot, as his administrator, recover on the policy for his sole benefit, in pursuance of an agreement between him and the insured that the insurance should be for his benefit. (p. 553.)

INSURANCE, LIFE—Evidence to Vary Contract.—Evidence that a life insurance policy was not procured for the benefit of the insured, and that he did not pay the premium thereon, does not tend to vary the written contract of insurance. (p. 554.)

Pruden & Pruden and Shepherd & Shepherd, for the plaintiff.

J. W. Hinsdale & Son, for the defendant.

³¹⁵ CONNOR, J. The plaintiff alleges that on November 8, 1897, the defendant corporation issued its policy to Mary F. Brothers for the sum of \$2,000 payable to her executors or administrators, and that she paid the premiums on it as they fell due; that on the — day of July, 1900, the said Mary died intestate, and the plaintiff was duly appointed her administrator; that proper proofs of death were duly ³¹⁶ forwarded to and accepted by the defendant and demand made for the payment of the amount of said policy and refused.

The defendant, answering, admitted issuing the policy, denied that Mary F. Brothers paid the premiums, admitted the death and denied that proper proofs of death were forwarded to and accepted by the defendant. The defendant also alleged that certain statements made by the insured in regard to her health were false; that such statements were, by the

terms of the policy, made a part of the consideration upon which it was issued, etc. For a further defense, the defendant alleged that on and before the date of the policy Mary F. Brothers was the wife of Joseph S. Brothers; that said Joseph purchased from C. L. Hinton, a son of the plaintiff, a tract of land which he represented to contain one hundred and fifty acres, for which the said Joseph promised to pay two thousand dollars; that said C. L. Hinton executed a deed to the said Joseph, and at the same time and as a part of the transaction the said Joseph executed his note to C. L. Hinton for two thousand dollars and a mortgage on said land to secure its payment; that the plaintiff was the real owner of the land, and that C. L. Hinton acted for his benefit in the sale thereof; that on November 2, 1897, he transferred said note to the plaintiff; that the tract of land contained only one hundred and seven acres and was not worth more than five hundred dollars, as was well known to both parties to said contract; that before November 2, 1897, it was agreed between said Joseph and the plaintiff that said Joseph should insure his life for the sum of two thousand dollars to secure the said indebtedness; that in consequence of said agreement the said Joseph made application for such insurance, but the application was rejected by the company to which it was addressed; that thereafter, and before the second day of November, the plaintiff requested the said Mary F. Brothers to insure her life to ³¹⁷ secure the said indebtedness; that pursuant to such request she made application to the defendant for a certificate of membership; that upon the faith of the representations made in the application, a certificate was issued payable to the estate of Mary F. Brothers; that the plaintiff, having no insurable interest in the life of said Mary, and well knowing that the defendant would not issue a certificate to said Mary payable to him as beneficiary, wrongfully and unlawfully entered into an agreement with the said Mary and the said Joseph, before or at the date of the application for said certificate, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary, but that the plaintiff should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the plaintiff in full of the indebtedness of said Joseph, and he would cancel the said mortgage, etc.; that at the time of or before making such application the said Mary promised and agreed to assign said policy to the plaintiff; that pursuant to said agreement the

plaintiff paid the admission fee and all dues and assessments levied upon said policy; that in pursuance of said agreement the said Mary on the — day of December, 1897, executed an assignment of said certificate or policy to the plaintiff, a copy of said assignment being attached to the answer; that the husband of the said Mary did not sign or consent in writing to the execution of said agreement, and no notice of the assignment was given to the defendant until after the death of the said Mary F. Brothers; that upon the death of said Mary the plaintiff notified the defendant that he was the holder of said policy by assignment, made proof of claim as such, and requested payment of the amount thereof.

The defendant refused to pay the amount to the plaintiff or to recognize him as assignee, whereupon the plaintiff ³¹⁸ demanded payment to him as administrator; that while this action is prosecuted by the plaintiff as administrator, the purpose is to secure the payment thereof for his sole benefit, personally, in pursuance of the said agreement; that the plaintiff had no insurable interest in the life of Mary F. Brothers, and that the agreement between the plaintiff Joseph S. and Mary F. was a fraud upon the defendant, and the policy was a wager, and in consequence thereof void.

It is provided in the policy that no assignment or change of beneficiary shall be valid without the consent of the company; that the assignee must have an insurable interest. The plaintiff filed no reply to the new matter set up in the answer. The defendant made a motion before answering, to set aside the service of summons on the insurance commissioner. This was refused and the defendant excepted. This question has been settled adversely to the defendant and the exception cannot be sustained: *Moore v. Mutual Reserve Fund Life Assn.*, 129 N. C. 31, 39 S. E. 637.

When the cause was called for trial the defendant tendered a series of issues directed to the several matters set up in the answer by way of defense to the action. The plaintiff objected and the court declined to submit either of the defendant's issues, to which exception was noted. The court thereupon submitted the following issues: "1. Is defendant company indebted to the plaintiff as alleged in the complaint? 2. If so, in what sum? 3. Did Mary F. Brothers obtain the policy of insurance by fraudulent representation?" The defendant expected.

It was admitted that the said Mary was dead and the plaintiff was her administrator. The plaintiff introduced the policy

and so much of the answer as admitted the receipt of proofs of loss, and rested.

The defendant introduced Joseph S. Brothers and proposed ³¹⁹ to prove by him each and every allegation in the answer as a further defense as above set forth. The questions propounded to the witness are set forth in full in the case on appeal and cover each and every one of said allegations. To this testimony the plaintiff objected. The objections were all sustained and the defendant excepted. There were other exceptions to the exclusion of testimony in regard to the physical condition of the insured, and it may be that they will not arise upon another trial.

Without entering into a discussion of the several exceptions bearing upon this phase of the case, we think there was evidence proper to be submitted to the jury under proper instructions, upon the third, or some appropriate issue, directed to the questions raised by the defendant in regard to the condition of the health and of the insured at the time the policy was issued and the representations made by her in the application.

The defendant also offered to prove that Mary F. Brothers was a woman of no property with which to pay life insurance premiums or assessments, and no capacity or ability to earn any money for that purpose. This testimony, upon objection, was excluded and the defendant excepted. The defendant offered to read the assignment in evidence. Upon the plaintiff's objection it was excluded and the defendant excepted. There was evidence tending to show that Mary F. Brothers worked in the field, did washing, picked cotton and performed other like labor. She died a few months after giving birth to twins. She was illiterate and unable to sign her name.

The plaintiff's contention is that the entire testimony, if admitted, failed to show any defense to the action. If he is correct in this, of course such testimony was immaterial and its rejection harmless. The proposed testimony was ³²⁰ clearly relevant to the issue and the witness competent to testify to such facts as were within his knowledge.

It would seem very clear that if the testimony offered by the defendant is true, as we must for the purpose of disposing of this appeal take it to be, a fraud was practiced upon the insurance company. It is expressly alleged, and, in support of the allegation, was proposed to be shown, "that John L. Hinton had no insurable interest in the life of Mary F. Brothers, and well knowing that the defendant would not issue a certi-

ificate of membership on the life of said Mary F. Brothers payable to him as beneficiary, entered into an agreement with the said Mary F. Brothers and the said Joseph S. Brothers, her husband, before or at the date of the application for the certificate of membership or policy of insurance, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary F. Brothers, but that said John L. Hinton should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the said John L. Hinton, who upon receipt of the amount thereof from the defendant should receive the same in full payment of the indebtedness of said Joseph S. Brothers to him, and that he should thereupon cancel and discharge the said mortgage upon the said tract of land. . . . In the light of the further testimony proposed to be introduced that the real value of the land sold was but five hundred dollars, and that the plaintiff paid the premiums and assessments, and within a month after the policy was issued the said Mary assigned it to the plaintiff, that none of these facts were known to the defendant, although there was a plain provision in the policy that no assignment should be valid until notice given to the company, the defendant was entitled to have an issue submitted to the jury inquiring as to the truth of the allegations, and in our opinion the proposed testimony was material and competent to be heard and considered by them upon such issue."

The defendant further says that the policy was what is known in the books as a wager upon the life of Mary F. Brothers, and therefore void as against public policy. Whatever conflict there may be, and it must be conceded that there is very much, as to what constitutes an insurable interest in the life of a person, this court has adopted a well-defined principle which meets our approval.

Burwell, J., in *College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291, after naming several cases, says: "These instances and others that might be mentioned seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life of the insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated by some rule of law, for which loss or damage the

insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object they have in view." Merri-
mon, J., in *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, says: "As the insured had no insurable interest in the life of the cestui que vie, the contract was simply a wager." In that case the premiums were paid by the beneficiary. In *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327, the policy was taken out by the insured and premiums paid by her. ³²⁴ This court sustained the policy. We have no disposition to question that case. The writer, if the question were an open one in this state, would feel constrained to follow the authorities holding the contrary view. The decision is sustained by the authorities cited. The testimony proposed in this case was that the agreement was made before or at the time of the application, and that the plaintiff was to pay the entrance fee and all further assessments, he not then having or expecting to have any insurable interest in the life of the insured. This is a very different case from one where the insured has taken out a valid policy, paying the premium thereon, either as a gift to some friend or as collateral security to a debt, and assigns the policy with the knowledge of the company. The plaintiff was to be paid his debt from the proceeds of the policy, he paying all of the premiums and awaiting her death to reap the profits of his bargain. In *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516, Seldon, J., says: "A policy obtained by a party who has no interest in the subject of insurance is mere wager policy. Wagers in general—that is, innocent wagers—are at common law valid, but wagers involving immorality or crime or in conflict with any public policy are void. To which of these classes, then, does the wagering policy belong? . . . Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about the event insured against."

The learned justice traces the history of the law and its development in England resulting in the passage of the act of parliament declaring all such policies void, saying: "My conclusion, therefore, is that the statute of 14 George III avoid-

ing wager policies upon lives was simply declaratory of the common law, and that all such policies would be void independently of that act": *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409.

While there are conflicting decisions in this country, a careful examination of them brings us to the conclusion that the foregoing is the sound view of the subject. "Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic and the most persistent condemnation": *Missouri Valley etc. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 751; *Price v. Knights of Honor*, 68 Tex. 366, 4 S. W. 633; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. Mr. Justice Field, in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, says: "Such policies create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy": *May on Insurance*, 4th ed., 44, 45.

The plaintiff, however, says that conceding this to be the law, the insured had an insurable interest in her own life; the policy was valid when issued; the assignment being invalid did not affect the integrity of the policy; that the right to maintain this action by the administrator of the insured is not affected by the void assignment. It is held in many cases, and we have no disposition to question the principle, that every person has an insurable interest in his own life and may insure his life for the benefit of his executors, administrators or assigns; that such policy being valid may be assigned to one having an insurable interest. We do not question the validity of assignments of life insurance policies to a creditor, or the right of the creditor to receive the amount of his debt, together with such sums as he has paid on account of assessments or premiums, or an assignment to one having any other insurable interest. That a creditor has an insurable interest in the life of his debtor is well settled. When the assignment of a policy is made in good faith to secure a subsisting debt, or a present loan, or a debt then contracted, the courts have sustained such assignment, certainly to the extent of such indebtedness and premiums paid out to keep the policy alive: *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *May on Insurance*, 80 et seq. The defense made and the testimony proposed to be introduced go very far beyond the principle upon which these cases rest. The allega-

tion here is that at and before the application was made there was an agreement between the plaintiff, the husband and the insured that the policy, although in truth and in fact was to be for the benefit of the plaintiff, who knew that he had no insurable interest in the life of the wife and knew that the company would not issue the policy payable to him, should be made payable to the estate of the wife and immediately assigned to the plaintiff, who was to pay the admission fee and all of the premiums.

In *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. St. 446, 2 Am. St. Rep. 572, 8 Atl. 638, application was made by the assured for and a policy issued on her life payable to her son in law, Norris. Pursuant to an agreement made before the application Norris assigned the policy to one Spangler, having no insurable interest in the life of the insured, who paid all of the assessments. Notice of the assignment was given to the company. Spangler was the medical examiner of the company and it was for that reason the policy was not made payable to him. Suit was brought upon the death of the assured by Norris to the use of Spangler. The court said: "If now we admit that Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest, neither was it for the benefit of Norris, but for the benefit of one who had no interest in the insured's life." The principle upon which the testimony offered by the defendant is made material is thus stated by the supreme court of Texas in *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 16 Am. St. Rep. 893, 12 S. W. 621, 7 L. R. A. 217, quoting from Bishop on Life Insurance: "The question ³²⁵ is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederate together to procure a policy for the plaintiff's benefit, when he is not and does not expect to be a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void. There are respectable authorities which hold that the assignment of the policy without regard to any pre-existing agreement, to one having no insurable interest, is a fraud upon the company, against public policy and therefore avoids the policy." This view is strongly stated by Horton, C. J., in *Missouri Valley Life Ins. Co. v. Crum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517. To the suggestion

that the attempted assignment was void, he says: "The law does not tolerate attempted frauds any more than it does those that are committed. . . . If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were engaged."

The supreme court of Pennsylvania in *Guilford v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, expresses itself in very vigorous terms regarding wagering life insurance contracts in every form: "The very foundation of the doctrine is that no one shall have a beneficial interest of any kind in a life policy, who is not presumed to be interested in the preservation of the life insured. . . . The beneficiary is directly interested in the death of the insured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see that did the defendant's case depend upon an assignment directly from Moose to himself, how it could be bettered in the least." The opinion concludes with these words: "So fraught with dishonesty and disaster and so dangerous even to human life has this insurance gambling become, that its toleration in a court of justice ought not for one moment ³²²⁸ to be thought of." Mr. May, in the last edition of his work on Insurance, comes to the same conclusion: "And although innocent wagers were once sustained, the courts will not now waste their time in discussing the question whether what is substantially a wager ought or ought not to be held good upon any grounds. Under the influence of a healthy public sentiment they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject matter": May on Insurance, 74. It is said, however, that the suit is by the plaintiff as administrator and the recovery will be for the benefit of the estate of Mary F. Brothers. The record shows that the defendant offered to show that, while the action is prosecuted in the name of the plaintiff as administrator, the purpose thereof is to secure the payment of the policy for the sole benefit of the said John L. Hinton, personally, in pursuance of the agreement set forth in the answer. This was excluded. If this were proved, it would be a singular result if by this means the plaintiff can reap the profits of a contract denounced by the law as contrary to public policy. If the agreement alleged to have been made by the parties to the transaction is shown by competent evidence and found by the verdict of a jury, it would be a re-

proach to the law if the two living parties can use its process to gather the fruits of their illegal agreement after the death of the one who was the ignorant and passive instrument of the scheme to make profit by her death. The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy. As his honor excluded the entire testimony offered by the defendant as immaterial, ³²³⁷ and as the case was argued before us upon that view, we cannot indicate otherwise than by the general principles announced what portions of it are competent.

The extent of our decision is that the defendant is entitled, if it can, to show that the application was made and the policy obtained under the circumstances and for the purposes alleged, and that the defendant had no notice of the agreement or of the assignment of the policy.

For the refusal to submit the issues tendered by the defendant, or such others in lieu thereof as the court may think proper, and to receive testimony material and tending to prove the affirmative of the issues, there must be a new trial.

WALKER, J. I concur in the result of this appeal upon the grounds first stated by the court in its opinion, namely, that the defendant is entitled to a new trial, because of the erroneous ruling of the presiding judge upon the question as to the condition of the health of the insured at the time she applied for the policy and the same was issued to her, and as to the representations made in the application. This error extends to all the issues, as a false, fraudulent and material representation in regard to the state of the insured's health, if found by the jury, will vitiate the policy.

Any Reasonable Expectation of pecuniary advantage, either directly or indirectly, from the continued life of another, creates an insurable interest in such life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity: *Mechanicks' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650. For other authorities defining insurable interest, see *Holmes v. Gilman*, 138 N. Y. 369, 34 Am. St. Rep. 463; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 57 Am. St. Rep. 228; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. St. 446, 2 Am. St. Rep. 572; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324, 9 Am. St. Rep. 111. A creditor has an insurable interest in the life of his debtor (*Insurance Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769), although the debt is barred by the statute of limitations: *Curtiss*

v. Aetna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114. And one who furnishes funds to carry on the business of a corporation has an insurable interest in the life of the manager: *Mechanicks' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650. Kinship is not essential to an insurable interest: *Carpenter v. United States etc. Ins. Co.*, 161 Pa. St. 9, 41 Am. St. Rep. 880. A husband has an insurable interest in the life of his wife: *Wheeland v. Atwood*, 192 Pa. St. 237, 73 Am. St. Rep. 803; and a woman has an insurable interest in the life of a man whom she is under contract to marry: *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004. As to whether a beneficiary can enforce a policy on a life in which he has no insurable interest, after the premiums have been paid, see *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, and cases cited in the cross-reference note thereto. The authorities are conflicting on the question whether a life insurance policy can be assigned to one who has no insurable interest in the life of the insured: See the monographic note to *Chamberlain v. Butler*, 87 Am. St. Rep. 506-508. *Mechanicks' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650. See the rule as stated in *Brett v. Warnick*, 44 Or. 511, post, p. 639.

Service of Process on Foreign Corporations is discussed in the monographic note to *Abbeville Elec. Co. v. Western Elec. Supply Co.*, 85 Am. St. Rep. 926-938. That service on the state insurance commissioner is binding on a foreign insurance corporation, notwithstanding it has withdrawn from the state or has had its right to do business therein revoked, see *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Magoffin v. Mutual Reserve etc. Assn.*, 87 Minn. 260, 94 Am. St. Rep. 699.

REYBURN v. SAWYER.

[135 N. C. 328, 47 S. E. 761.]

NUISANCE—Fish Nets in Navigable Waters.—If fish nets are set in a permanent manner by means of stakes driven in the soil of navigable waters so as to interfere with navigation, they constitute a public nuisance. (p. 556.)

NUISANCE, PUBLIC—Individual Remedy.—If a public nuisance causes unusual and special damage to an individual as contradistinguished from a grievance common to the public, he may bring a civil action for the redress of the injury. (p. 556.)

NUISANCE, PUBLIC—Injunction.—A person who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action for damages alone, but may also sue for and obtain an injunction. (pp. 558, 559.)

NUISANCE, PUBLIC—Injunction—Insolvency.—A court of equity may, in its discretion, grant an injunction to prevent a special injury to a private person from the erection or maintenance of a public nuisance, when there can be no other redress on account of the defendant's insolvency. (p. 559.)

NUISANCE, PUBLIC—Injunction—Fish Nets in Navigable Waters.—The owner of property is entitled to an injunction to compel the removal of set fish nets in the adjoining navigable waters, when such nets constitute a public nuisance and are of special injury to such owner in interfering with his access to his property, and when the person setting the nets is insolvent and unable to respond in damages. (p. 560.)

Application for an injunction to prevent the maintenance of a public nuisance created by setting fish nets in a permanent manner by means of stakes driven in the soil of a navigable stream, and interfering with the complainant's access to his property adjoining such navigable water. Judgment for defendant and plaintiff appealed.

J. W. Hinsdale & Son and B. G. Crisp, for the plaintiff.

Ward & Thompson and E. F. Aydlett, for the defendant.

326 **MONTGOMERY, J.** The referee's conclusions of law upon the facts found by him that the action of the defendant in the placing of pound nets in the manner in which they were set constituted a public nuisance was a correct one: *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411. To prevent a multiplicity of private actions, the law provides a remedy for public nuisances in the way of an indictment, by which the nuisance can be abated or the offender punished by fine or imprisonment, or in both ways. The plaintiff in this action, however, alleges in his complaint that he has suffered, and further that he has shown by the proof that he has suffered, an unusual and special damage on account of the erection of the nuisance by the defendant, and that he therefore is entitled to redress by a civil action—that is, to have the nuisance abated at his own suit. The plaintiff's contention rests upon a sound principle of law, and where the facts go to show that a public nuisance has been the cause of unusual and special damage to an individual or a class of persons, as contradistinguished from a grievance common to the public, that person may bring a civil action for the redress of the injury. In *Farmers' etc. Mfg. Co. v. Albemarle etc. R. R. Co.*, 117 N. C. 579, 53 Am. St. Rep. 606, 23 S. E. 43, the defendant, by erecting a bridge across a river so low as to obstruct the passage of boats plying up and down the stream, thereby prevented a steamboat from carrying a cargo of merchandise for a consignee up the river and beyond the bridge. The court held that the defendant was liable in dam-

ages for the injury done to the plaintiff, on the ground that the damage was special and unusual to the plaintiff. The court said there: "It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from ³³⁷ a point below the obstruction to a place located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier, as well as for the manufacturer who owned it." The same principle was announced in *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385. It is principle of law found stated in all of the text-writers on the subject of nuisance and in the decisions of many of the courts of the states. If the facts be such as the plaintiff claims he has shown them to be in this action, his right to relief by a civil action appears to be clearer in principle and more necessary to the peace and order of society than were the plaintiff's rights in the cases we have cited.

The plaintiff here is the owner of a tract of land (Durant's island) situated in the midst of navigable waters, and it is necessary to the full and free enjoyment of his property that his access over the waters to that property and his egress from it should not be obstructed by nuisances erected athwart the channels of approach. The claim of the plaintiff is, that not only was the erection of the fish nets, in the manner in which they were constructed by the defendant, a public nuisance, but that it prevented the free use and enjoyment of his private property, which was a damage and an injury to himself, not in common with the public at large, but as extraordinary and special in its effects upon him. In *Blanc v. Klumpke*, 29 Cal. 156, the court said: "Undoubtedly if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with, and to some extent prevented, can it be said he suffers in common only with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the ³³⁸ free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance and the subject of an action, and it is further provided that such action may be brought by a person

whose property is injuriously affected. In *Wilder v. De Con*, 26 Minn. 10, 1 N. W. 48, the court decided that the owner of a town lot suffers a peculiar damage by the obstruction of a portion of a public street immediately in front of his lot, and that he might therefore maintain an action to prevent such obstruction, although the same may be a public nuisance. In *Rex v. Dewsnap*, 16 East, 196, Lord Ellenborough said: "I did not expect that it would have been disputed at this day, though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influences of it. In the case of stopping a common highway, which may affect all the subjects, yet if any person sustains a special injury from it he has an action. This must necessarily be a special grievance to those who live within the direct influence of the nuisance and are therefore parties aggrieved within the statute allowing such parties costs." In *Wood on Nuisances*, pages 886, 887, it is said: "Redress may be had through the medium of a private action in behalf of each person specially injured, although the same damage is inflicted upon many persons at one and the same time, as an obstruction of a highway leading to one's premises, or so as to obstruct access thereto, or otherwise producing special damage; the obstruction of a navigable stream so as to hinder or delay passage over the same, or producing actual damage to vessels, or by cutting off the approach to a private wharf or premises so as to injure one's premises, is such a special injury as enables the person so injured to maintain an action." In *Park v. C. & S. W. R. R. Co.*, 43 Iowa. 636, a correct syllabus ³³⁹ of the decision may be stated as follows: "Injuries resulting from the obstruction of highways leading to the premises of the party complaining and interfering with access to them are proper grounds of recovery by the injured party, and this is so although many others sustain similar injuries from the same cause."

And we are of the opinion that one who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action merely for damages, especially where the damage arises from an injury and obstruction to the free use and enjoyment of one's property—lands and tenements, as in this case. In 2 *Wood on Nuisances*, page 1159, the author says: "Any person injuriously affected by a nuisance, who could maintain an action

at law therefor, can maintain a bill in equity for an injunction." And *Barnes v. Hathorn*, 54 Me. 127, *Thebaut v. Conova*, 11 Fla. 143, *Peck v. Elder*, 3 Sand. 126, *Danner v. Valentine*, 5 Met. (Mass.) 8, are cited in support of the text. Indeed, in a case like the present, it would be impossible to fix with any degree of certainty the damages which the plaintiff ought to recover for the obstruction of his access to his property; and this court has said in *Jolly v. Brady*, 127 N. C. 142, 37 S. E. 153: "But when the damage cannot be reasonably compensated in a suit at law, or the injury is irreparable, the court will stay the injury by injunctive order until the parties shall have the main facts determined by a jury." In *Wood on Nuisances*, page 119, it is said that "when the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interpose by injunction." In *Works v. Junction R. R. Co.*, 5 McLean, 525, Fed. Cas. No. 18,046, the court said: "If such injury exists, no adequate remedy can be found by an action at law. From the nature of the injury its extent cannot be ascertained with ²⁴⁰ precision. It is permanent; consequently the suits at law for redress must be endless. In such case adequate relief can be given only by injunction. It prevents the wrong. To establish this wrong it need not be measured by dollars and cents. It must be shown to exist; it must be material, but the particular amount of damage need not be shown."

But, besides, in this case it appears that if damages could be made a sufficient compensation for the injury done to the plaintiff, a recovery would be of no avail on account of the insolvency of the defendant, and the injury would therefore be irreparable. In 1 *Beach on Injunction*, section 34, it is said: "A court of equity in the exercise of its discretion may grant an injunction to prevent a breach or an injury for which there can be no other redress on account of the defendant's insolvency"; and in *Kerlin v. West*, 4 N. J. Eq. 449, it was declared that an injury may be irreparable, either from its nature or the want of responsibility in the person committing it: 10 *Ency. of Pl. & Pr.* 956.

So far we have considered this case on the theory that the referee had found the facts as the plaintiff insisted they should have been found from the evidence. The referee, however, found as a fact that "none of the boats of the plaintiff, his servants or agents, had been delayed or obstructed in

any passage which they have undertaken, or had been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant." If there had been no other finding of fact by the referee on the subject of the obstruction of the plaintiff's access to his premises, the judgment of the court below upon the referee's report would have to be affirmed. But there was another finding of fact on that subject, and one totally inconsistent with the finding which we have quoted ³⁴¹ above, which will result in a reversal of the legal conclusion upon those findings. The inconsistent finding of fact referred to is in these words: "In October, 1900 or 1901, B. G. Crisp, who is the attorney and representative of the plaintiff in Dare county, went from Manteo to Durant's island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatmen who carried Crisp to the island would not cross the reef. Owing to the rough water on the reef and the difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Crisp did not leave for two days. No attempt was made to start." We are of the opinion that upon that finding of fact the court should have given judgment that the plaintiff should have his injunction for the abatement of the nuisance.

Error.

Douglas, J., concurs in result only.

A Private Citizen may Sue to Enjoin a public nuisance which causes him special injury: *Cereghino v. Oregon Short Line R. R. Co.*, 26 Utah, 467, 99 Am. St. Rep. 843, and cases cited in the cross-reference note thereto. This principle is recognized in *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, where there was an interference with navigable waters. See, too, *Pickens v. Coal River Boom etc. Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819. One engaged in the business of fishing in navigable waters may maintain an action in behalf of himself and others similarly situated to enjoin the erection of a fish trap or pound net in the channel of the stream, if the trap or net will render it impossible for them to pursue the common right of fishing in the waters in that vicinity: *Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33. See, too, *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821. On the insolvency of a trespasser as affecting the right to injunctive relief against him, see the note to *Moore v. Halliday*, 99 Am. St. Rep. 741.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

IRELAND v. ADAIR.

[12 N. Dak. 29, 94 N. W. 766.]

GARNISHMENT, Sufficiency of.—To render an attachment of a debt due to the defendant valid, a copy of the warrant of attachment, and a notice showing the property attached, must be delivered to, and left with, the person against whom the debt exists. (pp. 562, 563.)

ATTACHMENT, Levy of.—Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. (p. 563.)

ATTACHMENT—Return of—Presumption.—An officer's return upon a warrant of attachment must show the acts performed by him in its execution, so that the court may decide upon its sufficiency, and it must be presumed that his return states all that he did toward effecting a levy. (p. 563.)

ATTACHMENT—Jurisdiction—Void Judgment.—If it appears from the record that no property was attached, that defendant was a nonresident, not served with summons, and not voluntarily appearing, a judgment for plaintiff is void, for want of jurisdiction. (pp. 563, 564.)

Ball, Watson & Maclay, for the appellant.

T. A. Curtis and F. S. Thomas, for the respondent.

31 COCHRANE J. This action was to recover the amount of a running account. An affidavit for attachment, containing the statutory requirements, was made, and the proper undertaking for attachment was given and approved. All papers were filed in the office of the clerk of the district court of Ransom county. A warrant of attachment, in proper form, was issued and delivered to the sheriff of the county, who made the following return of his procedure under the warrant: "I, A. C.

Cooper, as sheriff of the county of Ransom, state of North Dakota, certify that the summons, affidavit of attachment, undertaking on attachment, and warrant of attachment herein came into my hands for service on the fifth day of July, 1902; that I served the same upon C. E. Pearson and Gilbert La Du, as executors under the last will and testament of James Adair, deceased, by leaving with them a true and correct copy of the same; that C. E. Pearson and Gilbert La Du, as executors of the last will and testament of James Adair, deceased, certify under their hands and seals that they hold a sum of money, to wit, five hundred dollars, belonging to Lillian Adair, defendant." Nothing further appears from the judgment-roll to have been done by the sheriff in execution of his warrant, or in fulfillment of the directions of sections 5631, 5632, 5381 of the Revised Codes. Before the issuance of this warrant of attachment, an affidavit for publication of summons was made by plaintiff's attorney, in which it was stated that the defendant was not a resident of the state; that she has property in the state, and debts owing her from residents thereof. The sheriff's return upon the summons shows that defendant could not be found and was unserved. The summons was published and proof of publication made, and, on affidavit of default, a judgment was entered for the amount claimed in the complaint, with interest and costs. This appeal is from the judgment.

Personal service was not made upon defendant in this case, and she did not voluntarily appear. But the jurisdiction of the court to enter judgment, if any existed, was secured by publication of summons pursuant to the statute. The appellant assails the judgment as void for want of jurisdiction, on several grounds.

It is urged that there was no valid levy of the attachment, and consequently no property of the defendant was subjected to the jurisdiction of the court. The ³² sheriff's return on the warrant of attachment does not show a valid levy of the attachment upon the five hundred dollars due from Pearson and La Du to the defendant, Lillian Adair, because the sheriff did not serve upon Pearson and La Du a notice to the effect that he attached or levied upon the indebtedness. The statute (Rev. Codes, sec. 5362, subd. 4) provides that a levy under a warrant of attachment must be made upon personal property not capable of manual delivery by leaving a copy of the warrant and a notice showing the property attached with the person holding the same, and if it consists of a demand other than bonds, promissory notes, and instruments for the payment of

money, the copy of the warrant and notice showing the property attached must be left with the person against whom it exists. The lien of the attachment is effectual from the time such levy is made. The property here sought to be subjected to the lien of the attachment was a debt due to the defendant, and, under the imperative requirements of the statute, could only be attached in the method indicated. The proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder: *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619; *Courtney v. Eighth Ward Bank*, 154 N. Y. 688, 49 N. E. 54; 4 Cyc. 583, 589. Section 5381 of the Revised Codes required the sheriff, when the warrant of attachment has been fully executed, to return the same, with his proceedings thereon, to the court in which the action was commenced. It is his duty to state in his return what acts he performed in the execution of the warrant, so that the court may decide upon its sufficiency. We must therefore assume that in his return the sheriff stated all he did toward effecting a levy: *Sharp v. Baird*, 43 Cal. 577; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619. The sheriff's return in this case does not show even a substantial compliance with the statute. It does not disclose the service upon Pearson and La Du, or either of them, of a notice showing the property levied on. This is fatal to the attachment. In *Clarke v. Goodridge*, 41 N. Y. 213, the court, in construing a statute much like our own, said: "In executing the attachment upon the other kind of property, the sheriff is directed to leave a certified copy of the warrant of attachment with the head or agent of the corporation, or with the individual holding such property, with a notice showing the property levied on. . . . Those words were intended to perform an office, and by them the levy is confined to the items specified in the notice": *Wilson v. Duncan*, 11 Abb. 33 Pr. 3; *O'Brien v. Mechanics' etc. Ins. Co.*, 56 N. Y. 52; *Courtney v. Eighth Ward Bank*, 154 N. Y. 691, 49 N. E. 55. In the last case the following language is used: "The delivery of the certified copy of the warrant must be accompanied with a notice showing the property attached. Neither of these requirements can be dispensed with, and have a substantial compliance with the statute." There being no lawful attachment of property in this case, the court was without jurisdiction: *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Hartzell v. Vigen*, 6 N. Dak. 117, 66 Am. St. Rep. 589, 69 N. W. 203, 35 L. R. A. 451; *Plummer v. Hatton*, 51 Minn.

181, 53 N. W. 460. The facts in this case do not bring it within the rule declared in *Foster v. Davenport*, 109 Iowa, 329, 80 N. W. 404, cited by respondent. Pearson and La Du did not recognize the act of the sheriff as a valid levy, and the certificate that they held five hundred dollars belonging to Lillian Adair is not equivalent to a receipt to the sheriff that property is held by them subject to the lien of the attachment, and to be delivered to the sheriff on demand. There is nothing shown here upon which an estoppel could be built up in favor of the sheriff and against the executors of James Adair, should he seek to recover from them, claiming right to possession because of an attachment levy.

This renders a reversal of the judgment necessary, and a consideration of further assignments unnecessary. The judgment appealed from is reversed and declared void and of no effect.

All the judges concurring.

Attachment Proceedings must, in order to be valid, be in strict compliance with the provisions of the statute: *Williams v. Olden*, 7 Idaho, 146, 97 Am. St. Rep. 250, and cases cited in the cross-reference note thereto; monographic note to *Miller v. White*, 76 Am. St. Rep. 800, on judgments dependent for their validity on an attachment of property. Although the statute does not require notice to be given to the judgment debtor in cases of garnishment after judgment, yet such notice should be required in every case: *Union Pac. R. R. Co. v. Smersh*, 2 Neb. 751, 3 Am. St. Rep. 290.

BROWN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[12 N. Dak. 61, 95 N. W. 153.]

FOREIGN CORPORATIONS—Service of Process—Managing Agent.—A station agent of a railroad company organized in another state, who has authority to sell and collect for passenger tickets, and to receive and deliver freight and collect charges therefor for such company, is its managing agent, and service of summons upon him in an action against the company is service upon it. (p. 566.)

FOREIGN CORPORATIONS—Service of Process—Managing Agent.—An agent invested with the general conduct and control, at a particular place, of the business of a foreign corporation, is its managing agent upon whom service of summons may be made in an action against the corporation. (p. 566.)

EVIDENCE—Physical Examination.—If it is sought to recover damages for a permanent personal injury, the trial court has author-

ity to require the injured person to submit to a personal and physical examination by physicians or surgeons selected by the defendant, when in the exercise of sound judgment it appears to the satisfaction of the court that the necessities of the case require it. (p. 567.)

EVIDENCE—Physical Examination—Abuse of Discretion to Refuse.—If it is sought to recover for a personal injury and plaintiff's physician testifies that such injury is permanent, it is an abuse of discretion and reversible error for the court to deny to defendant the right to select physicians and have plaintiff submitted to a physical examination by them, to enable them to testify to the nature, extent and probable duration of such injury. This is especially so when the extent of the injury can be made to appear to the court only through the opinion of experts founded upon a personal examination. This rule is not affected by the fact that the plaintiff is a woman. (pp. 567, 568.)

H. H. Field and Ball, Watson & Maclay, for the appellant.

L. Combs, for the respondent.

64 COCHRANE, J. The defendant, a foreign corporation, appeared specially in this case, and moved to set aside the service of the summons and complaint because W. H. Gross, the person on whom the service was made, was not a managing agent within the meaning of the statute, and consequently, that service upon said Gross was not service upon the defendant corporation. In support of its motion, defendant presented the affidavit of one of its attorneys, setting forth that the only service of summons and complaint in this action was that made upon W. H. Gross, who, at the date of such service, was local station agent for defendant at the city of Fargo, in Cass county, North Dakota. That the defendant in January, 1896, pursuant to the requirements 65 of section 3263 of the Revised Codes of 1899, filed its irrevocable certificate in the office of the Secretary of State appointing such Secretary of State and his successors its true and lawful attorneys upon whom all process in any action or proceeding against it might be served, and stipulating therein that service of process upon its said attorney should be of the same force and validity as if served upon it personally in this state. That the defendant did not own any property or have any office in the county of Stutsman. That W. H. Gross, its station agent at Fargo, on whom service was made, had authority to act for it in the sale of passenger tickets for the carriage of passengers, and to collect pay for tickets so sold, to receive and deliver freight, and to collect unpaid charges for freight carried on said railway, with necessary incidental authority for the execution of the above powers, but with no other or further authority to represent it as agent.

This motion presents the question whether the station agent of a foreign railway corporation doing business within this state is a managing agent within the meaning of subdivision 5, section 5252 of the Revised Codes of 1899, which provides that the summons in a civil action may be served upon a foreign corporation by delivering a copy thereof to the Secretary of State, or to the president, secretary, cashier, treasurer, a director, or managing agent thereof, if within the state, doing business for the defendant. We agree with the trial court that Mr. Gross was enough of a managing agent for defendant to sustain this service. He transacted freight and passenger business for it at its Fargo station or office. "The person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in the state; and when that office is in charge of that person, and he there acts for the corporation, he is there doing business for it, and so manages its business": *Tuchband v. Chicago etc. R. R. Co.*, 115 N. Y. 440, 22 N. E. 360. "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent within the meaning of the code, which authorizes service of summons on a managing agent of a foreign corporation": *Porter v. Chicago etc. Ry. Co.*, 1 Neb. 14; *American Ex. Co. v. Johnson*. 17 Ohio St. 641; *Foster v. Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9, 23 L. R. A. 490. Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made. The statute is satisfied if he be ⁶⁶ a managing agent to any extent: *Palmer v. Pennsylvania Co.*, 35 Hun, 369.

Plaintiff alleged, in her complaint, permanent injury to her uterus and bladder, also the fracture of the hip bone, through the negligence of defendant's servants in bumping cars together, in one of which she was a passenger.

Defendant, after service of the complaint upon it, demanded of plaintiff's counsel the privilege of having plaintiff's person examined by medical experts, with a view to qualifying them to testify upon the trial as to the nature and effect of her injuries. This request was refused; whereupon one of defendant's counsel made affidavit that defendant was without knowledge as to the nature or extent of plaintiff's injuries, if any, and was without means of obtaining knowledge as to plaintiff's condition;

that an examination of plaintiff's person was necessary to a correct diagnosis of her case, without which examination defendant would be without witness as to her condition. To the end that justice should be done, defendant set out that an examination of her person by medical experts should be required and had, and moved the court, upon this showing, that plaintiff be required, before trial, to submit to an examination of medical experts as to the nature and effect of her injuries. This motion was denied.

Upon the cross-examination of plaintiff she was asked to submit her person to an examination by a physician for the purpose of enabling him to testify touching her physical condition. The question was objected to by her counsel. He stated that she was unwilling to submit to such an examination. The objection was sustained. The trial court placed his ruling upon ground thus tersely stated in his charge to the jury, and to which instruction an exception was also reserved: "The court is of the opinion that it is without power to make or enforce such order; and if the court is in error on that point, and has such power in a proper case, yet in this case, in view of the plaintiff being a woman, and in view of the examination necessary under all the circumstances, still would the court decline to make the order, for the reason that it would in this case be an ordeal to which she ought not to be subjected." This instruction and the several rulings hereinbefore set out are assigned for error, and present, for the first time in this jurisdiction, the question as to the court's power to require the plaintiff in a proper case to submit her person to a physical examination. We are of opinion that the court ⁶⁷ possessed the power in this case, and that it was an abuse of discretion to refuse to require plaintiff to submit herself to the examination of physicians under such reasonable restrictions as the court should prescribe.

Plaintiff asserts that her injuries are permanent, but to organs of the body which, whether sound or unsound, diseased or well, temporarily or permanently impaired in the performance of their functions, cannot be made to appear to the court but through her ipse dixit, or the opinion of experts, founded upon a personal examination of the parts. Where a plaintiff claims damages from another because, from its negligence, some bodily injury has been inflicted, or the functions of any organ of the body impaired, the fact of the injury or impairment of

the function, its nature, extent and probable duration must be established by competent, and that the best, evidence of which the case is susceptible. The very nature of the injuries here complained of is such as to render it highly improbable that the plaintiff could testify as to their development, whether permanent or susceptible of immediate cure. The best evidence is that of medical experts, who, from experience and training, can testify as to the conditions, wherein abnormal, and the probable duration and effect of the injury. To enable them to so testify, a personal examination was necessary. Plaintiff should not claim damages for an injury of which she was unwilling to furnish the best evidence.

Plaintiff was injured on the 26th of March, 1902; was examined by a physician in St. Paul, who gave her a bottle of medicine. She, on the same day, took the train for Dazey, North Dakota. She stayed with her son in law from March 27th until May 9th. No physician saw her or made an examination of her during this time. On the ninth day of May, Dr. Lang, at the request of her counsel in this case, made an examination for the purpose of qualifying him to testify upon the trial. She did not ask him to prescribe for her, and he did not prescribe for her; and she did not take any medicine or remedies of any kind for the ailments of which she complained, save the bottle of medicine before mentioned. Dr. Lang testified that he made a physical examination of her internally and externally; that he took off her clothes, and spent an hour and a half in the examination; that he did not find any fracture. He describes conditions of soreness and a retroversion of the uterus, which might have resulted from the accident complained of. The weight to be given the testimony of Dr. Lang as to what he found on this examination depends largely upon ^{as} the value of plaintiff's unsworn statements to him, thus: He found tenderness near the great trochanter. She complained of great pain on the inner side. Found a tender point about one inch descending of the ramus and ischial tuberosities. This injury was very painful; it caused pain at every step, and painful abduction of the limb. The mouth of the womb was pressing against the bladder, which caused pain at micturition. She complained of pain in passing water and difficulty in starting to pass water. It further appeared that Dr. Patton made a personal examination of plaintiff a few days before the trial, with a view to testifying in her behalf. That he was in Jamestown on the day of the trial and was not called as a witness.

Dr. Lang's examination, on which he discovered no fracture, antedated the complaint in which a fractured hip is alleged as one result of the accident. If plaintiff suffered the pains testified to by her, the fact that no physician was consulted for nearly two months, and then only to secure his testimony in her contemplated suit; that a physician of her own employment, who had examined her to qualify him as her witness, was present in town at the time of the trial, and was not called as a witness; in connection with her constant refusals to submit to an examination by physicians not in her employ—subjects her to criticism of not having produced the best evidence of which the case was susceptible, but rather with the suspicion of having suppressed or held back something. If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts, as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice.

We subscribe to the rule, declared by the supreme court of Georgia and followed in many other states, that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done: *Richmond etc. Ry. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, 3 L. R. A. 808; *Graves v. City of Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A. 641; *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367, 46 L. R. A. 153. Plaintiff, under this rule, could not insist upon her case going on, when she obstructed the investigation by her adversary which was necessary to a full consideration and correct determination of the controversy. She could not, over the objection of her adversary, withhold the best obtainable evidence as to the nature and permanency of her alleged injuries, and insist upon a verdict in her favor upon evidence of less weight: *Graves v. City of Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A.

641. If impartial justice is to be administered, we see no way of its attainment in all cases, if an important source of evidence is open to one, and closed to the other party: *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396.

The court had power to require her to submit to an examination, and it was an abuse of discretion in this case to refuse to exercise its power and require plaintiff to submit to such examination, or submit to a dismissal of her case if she refused, because defendant was without evidence as to her condition, and without means of procuring it, excepting in so far as the plaintiff made disclosure. The great weight of modern authority is to this extent. The cases vindicating this position are fully cited in the following opinions: *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396; *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367, 46 L. R. A. 153, and note; *City of Ottawa v. Gilliland*, 63 Kan. 252, 88 Am. St. Rep. 232, 65 Pac. 252; note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 238; *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851, 46 L. R. A. 448; *Louisville etc. Ry. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733; *Belt etc. Line Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89; 16 Ency. of Pl. & Pr. 483; 16 Ency. of Law, 2d ed., 810. The supreme courts of the United States, Massachusetts, Texas, and Delaware deny the power: *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35 L. ed. 734; *Stack v. New York etc. R. R. Co.*, 177 Mass. 155, 83 Am. St. Rep. 269, 58 N. E. 686, 52 L. R. A. 328; *Mills v. Wilmington etc. Ry. Co.*, 1 Marv. (Del.) 269, 40 Atl. 1114; *Galveston etc. Ry. Co. v. Sherwood* (Tex. Civ. App.), 67 S. W. 776.

In so far as the majority opinion of the supreme court of the United States was influenced by the federal statute quoted in its opinion, the *Botsford* case cannot be considered an authority here. When ⁷⁰ it is remembered that courts of the United States other than the supreme court possess no jurisdiction but what is given them by the Congress which created them, and that no statute gives to these courts power to order a discovery, the argument of the majority of that court that the statute of the United States prescribes the mode of proof in the trial of actions at common law, and that it shall be by oral testimony and examination of witnesses in open court, except as in the statute provided, and that the only exception provided for

is the one for taking depositions, and for compulsory production of books or writings in the possession of a party which contain evidence pertinent to the issue, and therefore that the statute inhibits any other form of examination or discovery, and removes from the courts the power to require it, we find this court is treating of limitations by statute that have no binding force upon state courts. There is no limitation, either in the constitution or statutes of this state upon the power of the district court to order such a discovery as was demanded in this case, under the circumstances here set out. The courts of Massachusetts, Texas and Delaware, in following the supreme court of the United States, did not notice the influence which the federal statute had upon the determination of the question by that court.

It was no answer to defendant's request for an examination that it would offend the modest and womanly instincts of the plaintiff to require her to submit to an examination of experts. She told a jury of twelve men of her pains; how and when they affected her. She submitted to a digital examination of her injured parts by two physicians of her own selection. It would have been no greater indignity to be examined by other doctors; but "when it becomes a question of possible violence to the refined and delicate feelings of a plaintiff, on one side, and possible injustice to the defendant on the other, the law cannot hesitate. It was essential to the ends of justice that plaintiff should submit to this examination": *Alabama etc. Ry. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, 9 L. R. A. 442; *City of South Bend v. Turner*, 156 Ind. 418, 82 Am. St. Rep. 481, 60 N. E. 275; *White v. Milwaukee City R. R. Co.*, 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 247. Neither was it an answer that one physician had examined her and testified to what he found, and was cross-examined by the defendant. Surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or ⁷¹ equally accurate in observation or in measurements, and thus form different judgments of the existing conditions, which, of necessity, must constitute the basis of their scientific opinions. If a defendant must take his defense against the expert opinions of the plaintiff's chosen surgeons, without the opportunity of testing the verity of the basis of such opinions, he may be placed at a disastrous disadvantage,

such as the law cannot and does not sanction: *City of South Bend v. Turner*, 156 Ind. 418, 82 Am. St. Rep. 481, 60 N. E. 275. Defendant's right was, through an examination, to test the effect and reduce the weight of the evidence introduced by plaintiff: *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. 622. The result of the investigation asked for should have put plaintiff's claim on impregnable ground, or have destroyed it altogether. In either case there would have been an assurance that justice had been done; an assurance which finds no secure anchorage in the present record: *Alabama etc. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, 9 L. R. A. 442.

The judgment appealed from is reversed. The district court will enter an order reversing its judgment, and directing such further proceedings as may be lawful in the premises. Appellant will recover costs.

All concur.

Agents of Foreign Corporations on whom service may be made are discussed in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. etc. Co.*, 85 Am. St. Rep. 930-935, on jurisdiction over foreign corporations.

In Actions for Personal Injuries the plaintiff may expose the injured portion of his person to the jury, and the court has power to order the plaintiff to submit to an examination to determine the nature and extent of the injuries complained of: *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232, and cases cited in the cross-reference note thereto. See the discussion of this question in the monographic notes to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 242-252; *Sidekum v. Wabash etc. Ry. Co.*, 3 Am. St. Rep. 554-557; *Sioux City etc. R. R. Co. v. Finlayson*, 49 Am. Rep. 726-730.

GRISWOLD v. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

[12 N. Dak. 435, 97 N. W. 538.]

COTENANCY—Right to Maintain Ejectment.—A tenant in common of real estate may maintain ejectment and recover possession of the entire tract as against strangers to the title. (p. 574.)

CONVEYANCES—Grant with Condition Subsequent—Breach of—Ejectment.—If an owner conveys land to a railroad company for a right of way upon express condition contained in the deed, that if the grantee fails to erect and maintain a depot at a point named in the deed, the land shall revert to the grantor, upon the failure of the grantee to maintain the depot, the title and right of possession revert, as the provision in the deed is a condition subsequent and

not a covenant, and not being restrictive as to the erection of depots at other points, is not void as against public policy. Hence, the grantor is not estopped from maintaining an action in the nature of ejectment against the railroad company. (p. 577.)

EJECTMENT Against Railroad Company—Stay of Execution of Judgment.—If the immediate execution of a judgment in ejectment against a railroad company from its right of way will work a hardship upon it, a court of equity may enjoin the proceedings to oust it from land upon which it has in good faith constructed its road until it shall have an opportunity to acquire title by condemnation proceedings. (p. 579.)

Purcell & Bradley, for the appellant.

C. E. Wolfe, for the respondents.

488 YOUNG, C. J. This action was instituted in the district court of Richland county for the purpose of ejecting the defendant railway company from a strip of land used by it for a right of way. The defendant is, and has been since February 12, 1892, a railroad corporation, operating a line of railroad from Sault Ste. Marie, Michigan, to Portal, North Dakota, and over the lands involved in this action, and is a common carrier of freight and passengers, and of the United States mail, and is engaged in interstate commerce. On February 12, 1892, the land in question was conveyed to the defendant by warranty deed containing the usual covenants of warranty. The conveyance was upon a condition subsequent, the condition being contained in the following clause: "Providing a depot and station is erected and maintained on section 21, above described, continuously; otherwise this land shall revert to original owner." Subsequent to the execution and delivery of the deed a depot was constructed, but the same was removed from the land on April 26, 1900. The case was tried to a jury. At the trial the defendant objected to the introduction of any evidence under the complaint "on the ground that such complaint does not state facts sufficient to constitute a cause of action, for the reason that it appears affirmatively from the allegations contained in the complaint that the defendant, the Soo Railway Company, was placed in possession of the premises in controversy by the plaintiffs under a warranty deed containing a condition subsequent, and that a possessory action which seeks to deprive the defendant of the possession of its road after it is constructed and operating trains cannot be maintained." This objection was overruled, and exception taken. A motion for a directed verdict upon the same grounds was also overruled, and exception taken. Upon the plaintiffs' mo-

tion, the court directed a ⁴³⁹ verdict for the plaintiffs for the relief demanded in the complaint, to wit, possession of the land in question. Thereafter judgment was entered in favor of the plaintiffs for the immediate and exclusive possession of the real estate in question and for costs. The judgment further ordered that execution thereon be stayed for a period of six months from the date of the entry of the judgment to enable the defendant to condemn said land and acquire an easement thereon and thereover under the laws of the state of North Dakota. Defendant has caused a statement of the case to be settled embodying specifications of numerous alleged errors in the admission and rejection of evidence, and upon the court's refusal to direct a verdict for the defendant and to the direction of a verdict in favor of the plaintiffs. The appeal is from the judgment.

Two reasons, and two reasons only, are urged in this court by the defendant as grounds for reversing the judgment. The first is that the evidence does not show title in the plaintiffs to the premises in controversy, either legal or equitable, such as will entitle them to maintain an action of ejectment even in case ejectment will lie. The second is that the remedy by ejectment cannot be granted on the facts existing in this case. Neither contention can be sustained. As to the first contention, it may be said that the plaintiffs claim perfect, legal, and equitable title. Whether this be the fact or not, we need not determine. The evidence shows conclusively that the plaintiffs in any event have an undivided interest in the real estate in controversy, and, if not the sole and absolute owners of the entire tract, are tenants in common. It is, therefore, unnecessary and improper to determine the extent of their interest, for the law is well settled that a tenant in common of real estate is entitled to the possession of the same as against all the world save his cotenants, and may maintain ejectment and recover possession of the entire tract as against strangers to the title: *Sherin v. Larson*, 28 Minn. 523, 11 N. W. 70; *Collier v. Corbett*, 15 Cal. 183; *Hart v. Robertson*, 21 Cal. 346; *Mahoney v. Van Wrinkle*, 21 Cal. 553; *Treat v. Reilly*, 35 Cal. 129; *Phillips v. Medbury*, 7 Conn. 568; *Robinson v. Roberts*, 31 Conn. 145; *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919; *Wheeling etc. B. R. R. Co. v. Warrell*, 122 Pa. St. 613, 16 Pac. 20; *Mather v. Dunn*, 11 S. Dak. 196, 74 Am. St. Rep. 788, 76 N. W. 922; *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847, 37 Pac. 671.

The remaining question is whether the plaintiffs may resort to the possessory action formerly afforded by the action of ejectment ⁴⁴⁰ to vindicate their rights. The appellant contends that they may not, but must invoke other remedies. Before taking up the consideration of this question, it is proper to state that both parties to this controversy agree that the clause in the deed above quoted constituted a condition subsequent; and that upon the failure of the defendant to maintain the depot the title to the land conveyed by said deed and involved in this action reverted. Neither is there any claim made that the plaintiffs did not promptly assert their alleged right of possession upon the failure of the defendant to maintain the depot, or that after the forfeiture they consented or acquiesced in any way in defendant's possession of the premises. Neither is it claimed that the plaintiffs have omitted to take any steps necessary to terminate the estate granted by the deed, or to authorize them to maintain this action, if it may be maintained. The condition upon which the grant was made, viz., that the title to the land should revert to the original owners of the defendant failed to maintain a depot at the point in question, did not restrict the maintenance of depots at other points, and was a lawful condition: *Lyman v. Suburban Ry. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; *Gray v. Chicago etc. Ry. Co.*, 189 Ill. 400, 59 N. E. 950; *Cleveland etc. Ry. Co. v. Coburn*, 91 Ind. 557; *Louisville etc. Ry. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404. Defendant does not contend otherwise. The sole contention of the appellant is that this action cannot be maintained. In support of this contention it is urged that the plaintiffs, by their acts, are estopped from maintaining an action for the possession; and, further, that public interest or public policy forbids its maintenance. As applied to the facts as they exist in this case, we cannot agree to this contention. It is true that many cases may be found which sustain the doctrine that a land owner who consents and acquiesces in the entry upon his land by a railroad corporation and in the expenditure of large sums of money thereon by the corporation under the justifiable belief that the owner will not assert his right of possession cannot maintain ejectment. The following cases may be cited as sustaining this view: *Missouri Pac. Ry. Co. v. Gano*, 47 Kan. 457, 28 Pac. 155; *McLellan v. St. Louis etc. Ry. Co.*, 103 Mo. 295, 15 S. W. 546; *South and North Alabama Ry. Co. v. Alabama Great Southern*, 102 Ala. 236, 14 South. 747; *Avery v. Kansas City etc.*

Ry. Co., 113 Mo. 561, 21 S. W. 90; Louisville etc. Ry. Co. v. Soltwedde, 116 Ind. 257, 441 9 Am. St. Rep. 852, 19 N. E. 111. On the other hand, other cases hold that the land owner may stand upon his strict legal rights, and maintain the action: Allegheny Valley Ry. Co. v. Colwell (Pa.), 15 Atl. 927; Smith v. Chicago etc. Ry. Co., 67 Ill. 191; Chicago etc. Ry. Co. v. Smith, 78 Ill. 96; Hibbs v. Chicago etc. Ry. Co., 39 Iowa, 340; Conger v. Burlington etc. Ry. Co., 41 Iowa, 419. Without expressing an opinion upon the doctrine of these cases, it is sufficient for the purposes of this case to state that there are no facts present in the case upon which an estoppel can be based. There is good reason for denying a land owner the right to re-take possession of land when he has by his acts or contract induced the belief that he would not do so, and the railroad company has acted upon that belief to its detriment as well as to the detriment of the public, if the owner were permitted to assert his possessory right. That, however, is not this case. In this case the defendant entered into possession under an express agreement that the estate which it acquired should be forfeited if it failed to comply with the condition of the grant—namely, the maintenance of the depot. It assented to the consequences of the default by expressly agreeing that, if the depot should not be erected and maintained continuously, "this land shall revert to original owner." It was within the power of the defendant to avoid the forfeiture of its title, but it elected not to do so, and thus voluntarily subjected itself to a forfeiture of the estate, as it was authorized to do under express terms of the grant. The owners of the land have not misled the defendant in any respect, or caused it to alter its position by inducement, promise or acquiescence. They are simply asserting the rights which were given under the express terms of the grant.

Neither can we sustain the contention that public policy requires that plaintiffs should be denied the remedy afforded by this action. As already stated, it is conceded that the title to the land in controversy reverted to the original owners. The plaintiffs are therefore entitled to all rights of owners, including the right of possession. They have not parted with the right of possession by deed or contract, or forfeited their right to assert it by consent, acquiescence or otherwise. The defendant's title and right of possession were voluntarily forfeited by it when it declined to further perform the condition which gave it such title and right of possession. Does public policy require

that the plaintiffs shall be remediless? That they shall be stripped of the power to vindicate their rights of property when ⁴⁴² they were without fault? The appellant answers that they have other adequate remedies, and that they must resort to them, and not invoke a remedy to recover possession, which may interfere with public interests. Cases are numerous in which the doctrine which is invoked has been applied. They will be found to be cases in which the grantee covenanted and bound himself to perform the conditions; that is, in each case there is both a condition and a covenant (or an absence of an express provision that the title should revert). In these cases the grantor has alternative remedies. He could compel the specific performance of the covenant, or maintain his action for its breach, or forfeit the estate and recover the premises. To avoid a forfeiture of the estate, which is always odious in the eyes of the law, and in some cases from consideration for public interests, courts have compelled grantors to rely either upon their action for specific performance or for damages. The doctrine of these cases, however, has no application to the facts of this case. The deed contains no covenant, but merely a condition. The defendant did not covenant or agree to maintain the depot, and in no way bound itself to do so. It merely accepted the grant of the land in question upon the condition that, if it did not maintain the depot, the land should revert to the original owners. It might elect to maintain the depot and retain the land, but it was not bound to do so. The only liability which it incurred for failure to observe the condition was that the land should revert. It is entirely clear, therefore, that the plaintiffs cannot maintain an action to compel the defendant to maintain the depot for there is no agreement upon which to base such an action. Neither can it maintain an action for damages for its failure to maintain the depot, for the same reason. Its only remedy is that which it now seeks. On this point see the following cases: *Jackson v. Florence*, 16 Johns. (N. Y.) 47; *Palmer v. Fort Plain etc. Plank Road Co.*, 11 N. Y. 387; *Livingston v. Stickles*, 8 Paige (N. Y.), 398; *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Close v. Burlington etc. Ry. Co.*, 64 Iowa, 149, 19 N. W. 886; *Clarke v. Inhabitants etc.*, 81 Mo. 503, 51 Am. Rep. 243. In *Palmer v. Fort Plain etc. Plank Road Co.*, 11 N. Y. 387, the court said: "It is clear that there may be a condition without a covenant, and that, where the language imports a condition merely, and there are no words importing an agreement,

it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. . . . It by no means follows, because a grantee consents to take an estate, subject ⁴⁴⁸ to a certain condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility in addition." The right to maintain an action for trespass affords a remedy only for the interference with the plaintiff's possession, and is not a substitute for the remedy to recover the possession itself. In short, the present action is the only one to which the plaintiffs can resort to vindicate their property rights. In this state a land owner may be compelled to submit to a loss of his land through condemnation proceedings under the power of eminent domain. The right to exercise that power was open to the defendant. It not only has declined to exercise it, but it insists upon using plaintiffs' lands without legal right, and also demands that plaintiffs be denied the only remedy they have to vindicate their property rights; and this upon the ground that public policy demands that it be afforded this protection. The plaintiffs' property rights are protected both by the constitution and by the statute. In the absence of a transfer by deed or contract, or its loss by consent or acquiescence, the title and right of possession of the land can be obtained by defendant only by an exercise of the power of eminent domain. A similar question was before us in the case of *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441, 58 L. R. A. 775, which was an action to enjoin a telephone company from maintaining its poles upon a street abutting plaintiff's property. It was urged in that case that the plaintiff had an adequate remedy in an action to recover damages, and that the remedy afforded by injunction for protecting his property rights would seriously interfere with public interests, and should not, therefore, be accorded. Both contentions were overruled, and for reasons which are controlling in this case. The court said: "The defendants are proceeding to damage the plaintiff's property without first complying with a mandatory provision of the constitution. That provision of the constitution is peremptory that property taken or damaged for public use shall first be paid for, and the legislature has also enacted that payment must precede the taking or damage, and has provided adequate means for establishing

the amount of such damages. The taking or damaging of private property for public use without the owner's consent is deemed so serious that payment therefor is a prerequisite to attempting to do so. The defendants ⁴⁴⁴ have the ultimate right, under their franchise, to use the street for telephone purposes; but payment of damages, actual or consequential, to plaintiff's property, must be first attended to. This does not mean that it may first be appropriated, and paid for at the end of a suit for damages, but means that payment must precede the taking or damaging"; citing *McElroy v. Kansas City (C. C.)*, 21 Fed. 261; *Searle v. City of Lead*, 10 S. Dak. 405, 73 N. W. 913, and numerous other cases. We held in that case that the occupancy of the plaintiff's property was a violation of rights which were protected both by the constitution and by statute, for the prevention of which a preliminary injunction should have been granted. We know of no doctrine of public policy which authorizes the courts to deprive an individual who is without fault of the possession of his real estate by withholding remedies adapted to vindicate his right of possession. The cases are numerous wherein the remedy by ejectment has been invoked and sustained on facts substantially like those which exist in this case: *Indianapolis etc. Ry. Co. v. Hood*, 66 Ind. 580; *Horner v. Chicago etc. Ry. Co.*, 38 Wis. 165; *Avery v. Kansas City etc. Ry.*, 113 Mo. 561, 21 S. W. 90. See, also, *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547; *Ritchie v. Kansas etc. Co.* 55 Kan. 36, 39 Pac. 718.

It is not an uncommon practice, in view of the hardship attending the ejectment of a railroad company from its right of way, for a court of equity to enjoin the proceedings to oust it from land upon which it has in good faith constructed its road until it shall have an opportunity to acquire title by condemnation proceedings: *Allegheny Valley R. Co. v. Colwell (Pa.)*, 15 Atl. 927; *Pittsburgh etc. Ry. Co. v. Bruce*, 102 Pa. St. 23; *Harrington v. St. Paul etc. Co.*, 17 Minn. (Gil. 188), 215; *South & North Alabama Ry. Co. v. Alabama etc. Co.*, 102 Ala. 236, 14 South. 747; *New York etc. Co. v. Stanley*, 35 N. J. Eq. 283; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; 3 *Elliott on Railroads*, sec. 944. In this case that power was exercised by the court in staying the execution of the judgment for a period of six months for the purpose of enabling the defendant to prosecute its condemnation proceedings. This course was proper, in our opinion,

Finding no error in the record, the judgment will be affirmed.

All concur.

A Cotenant may Recover in Ejectment against a stranger the whole of the property of the cotenancy: See the monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 842; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771; *Mather v. Dunn*, 11 S. Dak. 196, 74 Am. St. Rep. 788; *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847. There are decisions, however, which limit his recovery to the extent of his title: *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 765; *Baker v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540; *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838, and note.

NORTHWESTERN TELEPHONE EXCHANGE COMPANY v. ANDERSON.

[12 N. Dak. 585, 98 N. W. 706.]

MUNICIPAL CORPORATIONS—Telephone Companies—Vested Rights.—The acceptance of the terms and conditions of an ordinance granting to a telephone company the use of the streets of a city constitutes a contract between the company and the city, and the construction of its line at large expense gives such company vested rights which the city cannot impair by granting to persons the use of such streets for private purposes or extraordinary uses. (p. 584.)

MUNICIPAL CORPORATIONS—Use of Streets—House moving in a street is an extraordinary use thereof, and while it may be permitted, it cannot be allowed so as to destroy the use of the street for the purpose of travel or other necessary public purpose, or to destroy or impair vested rights. (p. 586.)

MUNICIPAL CORPORATIONS—Use of Streets—House Moving—Telephone Line.—A licensed house mover in a city is liable for an injury done by him, while moving a house, to the wires and property of a telephone company authorized by ordinance to establish and maintain a telephone line and system in the streets of such city. (p. 588.)

G. C. H. Corliss, for the appellants.

T. R. Bangs, for the respondents.

587 **MORGAN, J.** This action is brought to recover damages alleged to have been caused to plaintiff's property by the defendants while moving a house through and upon the streets of the city of Grand Forks. The complaint alleges the incorporation of the plaintiff company under the laws of the state of Minnesota, doing business as a telephone company in said

state and in the state of North Dakota by legal authority; that in August, 1890, the city of Grand Forks, under statutory authority, passed an ordinance, which was duly approved by the mayor, and published as provided by law, granting the plaintiff company a franchise to erect telephone poles in the streets and alleys of said city, to place wires and cross-bars thereon, and to do the same for the purpose of supplying said city and its citizens the benefits to be derived from communication by telephone between themselves; that such ordinance provided that it should take effect in ten days after the acceptance by the plaintiff of certain conditions and restrictions imposed by the ordinance upon said telephone company. Among such conditions, and as a consideration for granting such franchise, was one to the effect that such telephone poles were to be placed at such places and the wires stretched across or along said streets at such height, as directed by the city engineer and approved by the city council. A further condition to and consideration for the granting of such franchise was that said company should allow said poles to become a city instrumentality for attaching thereon, at the upper arm thereof, the city's fire alarm or police wires, and that said city should have the use of one telephone free of charge, and such others as it desired for its business at seventy-five per cent of the usual price charged therefor. Said company unconditionally accepted all the conditions imposed by such ordinance by an acceptance thereof in writing, duly filed in the city clerk's office. The complaint further alleges that the plaintiff, upon its acceptance of the conditions imposed by the ordinance, established a telephone system in said city at a large expense, and has ever since maintained the same as a local telephone system and as a long distance system, with facilities for communication between said city and other cities in North Dakota and in Minnesota, South Dakota, Wisconsin and Iowa; that in April, 1900, the defendant Anderson notified the plaintiff that he intended to move a building known as the "Arlington Hotel" through and along some of the streets of said city, naming them, and notified the plaintiff to give its wires the required attention in ⁵⁸⁸ view of such moving. The plaintiff thereupon commenced an action against said defendant, and procured from the district court of Grand Forks county a preliminary injunction against the moving of said building as an interference with its property rights, as such moving would injure its property by breaking its wires; that upon the service of such injunctive order, summons and com-

plaint the defendant appeared in said action, and moved that such injunctive order be set aside. The court made an order denying such motion unless the defendant, Anderson, would furnish a bond indemnifying the plaintiff against all damages incurred by it by reason of the moving of said building by destruction of its property. The bond was furnished and the building moved. This action is brought on the bond. Damages are alleged at two hundred and seven dollars and ninety-five cents. The answer alleges that the defendant rightfully moved such building under legal authority granted to him by virtue of a permit to move said building, issued to him pursuant to a valid ordinance of said city, authorizing the building inspector of said city to issue such permits to persons entitled thereto, as the defendant was as a duly licensed "house-mover"; and that he gave to the city a bond, as provided by its ordinances, indemnifying the said city against any liability incurred by it by reason of damages incurred by it on account of moving of houses by him pursuant to such permit. The case came to trial before a jury upon admitted facts. The trial court directed a verdict for the plaintiff. Judgment was entered pursuant to such verdict, and defendants excepted thereto. The defendants appeal from such judgment.

The only error assigned is that the court erred in directing a verdict for the plaintiff. Two questions only are involved in this appeal: 1. Plaintiff's right under the ordinance granting it a franchise to establish and maintain a telephone system within said city; 2. Defendant Anderson's rights, under the permit issued to him to move said building, based on the ordinances of said city. The plaintiff claims that by its acceptance of the conditions of the ordinance granting the right to establish a telephone system in said city, and its expenditure of large sums of money in establishing and maintaining such system, a contract was entered into with said city under such ordinance, and vested in said company inviolable rights, which it cannot be deprived of by the use of said streets in matters of a private nature not included in the lawful use of said streets for traveling purposes by the public, and that the use of ⁵⁸⁹ said streets for house-moving purposes is not a use of them for traveling purposes, and not the primary or usual use of them. On the part of the defendant it is claimed that Anderson, having been licensed, and by special permit authorized to move the building, his acts in doing so were rightful and legal, and that the city had no power to grant plaintiff privileges that would bar-

gain away defendant's right to move buildings along the streets, as said business is a lawful, necessary and usual use of the city's streets. The city council of Grand Forks is authorized under its charter "to lay out, establish, open, alter, widen, grade, pave or otherwise improve streets, alleys, avenues, . . . and vacate the same, . . . and to regulate the use of the same": Comp. Laws, sec. 885, subds. 7, 9. Subdivision 10 of said section provides that it may prevent and remove obstructions and encroachments upon its street. Subdivision 17 of said section 885 authorizes the city council "to regulate and prevent the use of streets, sidewalks and public grounds for signs, signposts, awnings, telegraph or telephone poles," etc. A telephone system is classed as a public use and to further its establishment the right of eminent domain may be exercised: Rev. Codes 1899, sec. 5956, subd. 7. The sections above referred to confer upon the city the power to pass the ordinance under which the plaintiff company was granted the franchise under which it established and maintains its telephone system in said city. The city council's authority to pass such ordinance as one of its granted powers is not contested in this case. It is claimed, however, that it could not, by so doing, impose any burdens upon the defendant Anderson in properly exercising his license to use the streets in his business of moving houses. In *Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 441, 58 L. R. A. 775, this court held that city councils may authorize the use of the streets for appliances necessary to the maintenance of telephone systems, but that, having done so, abutting owners are not thereby deprived of the right to compensation therefor as owners of the fee to the streets. The city council having, under such statutory authority, granted plaintiff the right to use the streets of the city for this purpose under an ordinance with proper restrictions upon the exercise of the right so that travel shall not be interfered with, the question remains for answer, What are plaintiff's rights so far as this litigation is concerned? Was the right granted a naked permission to set poles and string wires on the streets, or was it accompanied by protection ~~soo~~ from damages by reason of other uses of the streets permitted by the council for private purposes? The city receives pecuniary benefit from the plaintiff in the free use of plaintiff's property. This was exacted as a condition precedent to the ordinance becoming operative. The conditions imposed on the plaintiff before the streets should be used by it were accepted. The plaintiff company applied for the franchise. The city

granted this privilege upon terms imposed as a consideration. The plaintiff accepted the franchise with the conditions imposed. It has thereafter expended large sums in carrying into effect its acceptance of the ordinance with its conditions. A contract was thereby, in effect, entered into between the two corporations. The contract cannot now be impaired by the city in granting to persons the use of the streets for private purposes. "So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee by a compliance with its conditions, becomes a contract which the city cannot abolish or alter without consent of the grantees": *Rutland Co. v. Marble City Co.*, 65 Vt. 377, 36 Am. St. Rep. 868, 26 Atl. 635, 20 L. R. A. 821. "Certainly, after the expenditure in the erection of poles, made in reliance upon the municipal designation the company obtains a vested right, of which they cannot be stripped by a subsequent revocation of such designation": *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 304, 60 Am. Rep. 619, 8 Atl. 124. "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous conditions therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629"; *City of New Orleans v. Great Southern Tel. Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 South. 533. "When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of such contracts": *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520, 80 N. W. 383, 47 L. R. A. 87. ⁵⁹¹ See, also, *Northwestern Tel. etc. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69; *City of St. Louis v. Western Union Tel. Co. (C. C.)*, 63 Fed. 68; *Meyers v. Hudson County Elec. Co.*, 60 N. J. L. 350, 37 Atl. 618; *City of New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 South. 533; *Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252. It is true that the ordinance under which the

plaintiff is maintaining this system was not repealed, but the effect of granting defendant the right to move the building was destructive of plaintiff's property, and therefore a violation of plaintiff's contractual rights under the ordinance. Whether such contractual rights could be relied on in case of changes in the location of poles or damages done to them demanded by a necessary and usual use of the streets by the city, is not here presented. Whether the use of the streets in moving houses is inconsistent with plaintiff's use of the streets under the ordinance, or impairs its right to use such streets, is the only question passed on here.

The city gave the defendant permission to move the building in question. The defendant was licensed to move houses in said city. The license was granted only on condition that he give a bond to indemnify the city against any loss occasioned by the defendant in that business to property, public or private. A license fee of twenty-five dollars was also exacted as a condition to the granting of such license, and paid by defendant. By granting the license under the ordinance, the council acted under the statutory power given it to regulate the use of the streets. That the council can rightfully do so under restrictions is undoubtedly true. It is not an absolute right that any one can demand, but the power is to be exercised or not, as a matter of discretion: *Woodward v. Boston*, 115 Mass. 81; *Eureka City v. Wilson*, 15 Utah, 53, 62 Am. St. Rep. 904, 48 Pac. 150. The use of the streets for moving houses is not, however, a usual, but is rather an extraordinary one. It does not pertain to the primary right to the use of the streets for travel or other public purposes. The public derives no benefit therefrom generally. Such extraordinary use of a street may, however, be permitted as a favor, under restrictions safeguarding the rights of the public to the street in certain cases, as necessity may require. In *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263, the court said: "Because of the privilege thus secured to it by the law and the action of the city authorities, the company has invested ⁵⁸² its money, and they thereby perfected obligations which the constitution says shall not be impaired. The defendants propose to occupy the highway not for the purpose of ordinary travel or communication, but for the purpose of moving a very large frame building, to do which nearly the entire street is occupied. This, it must be admitted, is an obstruction of the street. It certainly interferes more or less with ordinary travel, but the question is not whether or not

they may so occupy the street in case by doing so they do not become a nuisance to others who desire and have a lawful right to use the streets for the purposes for which they are established, but the question is whether or not they have a right, in using the street, to prevent the company from the full, free and complete exercise of the franchises with which it is clothed. I think the statement of the question brings with it the correct answer. While all persons ordinarily have a right to use the street to the same extent with the car company, yet they have no right unduly or unreasonably to occupy the street, and so to prevent the passage of trains." In that case the defendant had no license or permit to move the house. Hence, the case is in point only in principle in this case. In *New York etc. Tel. Co. v. Dexheimer*, 14 N. J. L. 295, the defendant was a licensed house-mover, and in moving a house cut the wires of the company's system. Suit was brought for damages, and the jury was charged that the defendant was liable if he cut any wires that were put up and maintained in accordance with the city ordinance under which they were put up, and ordered damages assessed in plaintiff's favor for such as were thus maintained and were cut, and these only. In *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 30 Am. St. Rep. 201, 20 N. E. 408, 15 L. R. A. 64, the court said: "Where a right to use a street is acquired pursuant to statute and under a license from a municipality, it is in the nature of a contract right, and the municipality itself cannot destroy or materially impair it. . . . It is undoubtedly true that all such rights are subordinate to the paramount power, usually denominated by the 'police power,' for that power cannot be annihilated by contract. . . . It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which has assumed to exercise rights under the laws of the state, and to which the officers of the government have given recognition by granting it the right to use the streets of a city. . . .

588 The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city. They are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode, and for an unusual purpose. . . . It would be strange, indeed, if large buildings could be moved along the thronged streets of a city without control or restriction, and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another." In *Dickson v.*

Kewaunee Electric etc. Co., 53 Ill. App. 379, the jury were instructed "that the company had a right to place its wires in the street, if allowed by corporate authority, if it did not interfere with the ordinary use of the public in the streets, and that removing a house along the streets was not within the rights enjoyable by the public as a use of the public streets." This instruction was sustained in the appellate court: See, also, Pennsylvania Tel. Co. v. Varnau (Pa.), 15 Atl. 624; Day v. Green, 4 Cush. 433; Graves v. Shattuck. 35 N. H. 257, 69 Am. Dec. 536; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409.

The evidence shows that the wires were stretched and the poles placed in compliance with the ordinance under the supervision of the city officers. The building which was moved was a large building, and forty-three feet high when being moved, and seven feet higher than the highest of plaintiff's telephone wires, as placed pursuant to such ordinance. Our conclusion is that the defendant's rights to the street for house-moving purposes were subordinate to those of the plaintiff; that plaintiff was given paramount rights to the streets by virtue of the ordinance containing no provision for direct or indirect revocation for private purposes; that defendant was a mere licensee, with privileges to use the streets in a manner not unreasonably interfering with the use of the streets for traveling purposes, and without interference with those having prior rights to them under ordinances that have ripened into relations in the nature of contracts, thereby becoming vested rights; that the use of the streets by defendant for such purposes was not an ordinary, but an exceptional and extraordinary, use thereof, out of which the public as such derives no benefit; that neither the defendant's license nor the special permit to move this building did or could protect him from liability for damages to plaintiff arising out of the exercise of the permission given him to move this building. The ⁵⁸⁴council did not, and would have no power to, grant a license to move the building, and give therewith immunity from damages consequent upon the exercise of the license. Such permission can only be given by the council for the use of the street for such purpose; that is, for moving the building. To add to such permission expressly or in effect a provision that the exercise of the permission would leave those damaged thereby without remedy against the defendant, would be a void, unreasonable and inoperative provision. Its effect would be to impair and nullify the previous grant to the plain-

tiff, under which vested rights ripened: To compel plaintiff to remove its wires or repair them whenever called upon to do so by persons moving houses would add a burdensome and unreasonable condition to the ordinance under which it acts, not contemplated by its terms as passed. So far as the plaintiff is concerned, and its property rights, defendant was a trespasser, acting without any legal authority. Appellants' contention is that plaintiff accepted the terms of the ordinance with knowledge that the council possessed the power to authorize the moving of buildings, and possessed such power as a trust which could not be impaired. This would be true of any usual use of the streets, or for traveling purposes, or necessities arising in the interests of the public. So far as purely private interests are concerned, the plaintiff's rights cannot be jeopardized by imposing new and unreasonable conditions. We think it more reasonable to say that the plaintiff accepted the ordinance under a presumption, which it had a right to indulge in, that its rights were paramount so far as extraordinary uses of the streets were concerned, and only subject to impairment by the usual and necessary use of the streets, or when public necessities demand it.

The defendants are legally liable for the damages incurred, and the judgment will be affirmed.

All concur.

Cochrane, J., having been of counsel in the court below, took no part in the decision, Judge W. J. Kneeshaw, of the seventh judicial district, sitting in his place by request.

When the Moving of a House across the track of an electric street railway necessitates the stoppage of traffic for hours, and the cutting or destruction of the wires, it may be enjoined: Williams v. Citizens' Ry. Co., 180 Ind. 71, 80 Am. St. Rep. 201.

CLAPP v. HOUQ.

[12 N. Dak. 600, 98 N. W. 710.]

CONSTITUTIONAL LAW—Administration on Estate of Living Person.—A statute providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead, or has been secreted, confined, or otherwise unlawfully done away with," is void as depriving a person of his property without notice and due process of law, when applied to the property of a living person. (p. 592.)

EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Notice.—The mere taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted under authority of a statute void because not providing for notice, is not such notice to such living person as will validate the proceedings. (p. 594.)

EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Exercise of Police Power.—The taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted by authority of a statute void because failing to provide for notice, cannot be upheld on the ground that such statute is a valid exercise of the police power of the state. (p. 595.)

EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Costs and Disbursements.—The mere taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted under authority of a statute void, because not providing for notice to such person, does not render his estate liable for costs and disbursements in administration, although the special administrator acted in good faith. (p. 596.)

T. H. Peterson and W. J. Clapp, pro se.

G. C. H. Corliss, for the respondent.

602 **MORGAN, J.** In December, 1899, one Louis Houq, thirty years of age, disappeared from Grand Forks county under circumstances which afforded reasonable grounds for the belief that he was dead, or had been secreted or otherwise unlawfully made away with. Upon his disappearance, search was made for him by the public authorities, and a reward offered by the county commissioners of said county for the production of his body and the apprehension of his murderers. All his relatives were notified of the facts relating to his disappearance. Some of the relatives resided in Minnesota, and others in Norway. Upon their request, a most careful and thorough search was again made for his body. One Swenson,

a brother in law of Houg, consulted the states attorney, and upon his ⁶⁰³ advice an application was made for the appointment of a special administrator, and for this purpose Swenson was given a power of attorney from all the relatives of said Houg to act as their representative. When Houg disappeared he left in the house, on the farm on which he worked as a foreman, personal property consisting of clothing, a trunk, carpenter's tools, and one promissory note for five hundred dollars, and some other personal property. There were no creditors. All of his personal property was worth about five hundred and forty dollars. The appellant, William J. Clapp, was duly appointed special administrator on April 30, 1901, under subdivision 2 of section 6325 of the Revised Codes of 1899, and duly qualified by giving a bond for the faithful discharge of his duties. He inventoried the property, and took the same into his possession. Said Houg was not dead, however, and informed his relatives of his whereabouts in January, 1902. He had secretly left the place on which he worked, and had gone to the state of Washington, where he worked without communicating to any of his former friends or his relatives his whereabouts, although able to do so, he being of good health during all this time, and capable of writing to them if he so desired. The expenses of the special administrator, attorney's fees, court fees, searching for the body, and other disbursements, amounted to two hundred and forty-five dollars and eighty-four cents. The probate court disallowed the bill for expenses and disbursements, and the administrator appealed to the district court. The trial court found that the order of the county court appointing a special administrator of Houg's estate was null and void, for the reason that said Houg was not dead, but a living person, and denied the administrator's application for costs and necessary disbursements and expenses incurred while acting as such special administrator. The administrator appeals from the judgment entered on such finding.

It is conceded by the respondent that the administrator and all persons concerned in the appointment of an administrator acted in good faith. It is also conceded by the respondent that the disbursements, as presented for allowance, are reasonable in amount, in view of the services rendered. It is conceded by the appellant that the order appointing the special administrator was properly set aside, but he contends that the necessary expenses of such administration should be allowed

and paid before he can be compelled to turn over the property. The grounds of his contention are that the statute under which the appointment was made does not contemplate a general administration of the estate, but simply taking possession ⁶⁰⁴ of the estate of the absentee until his return, or until satisfactory proof of his death is received, and a general administrator appointed. The statute under which the appointment was made reads as follows:

"Sec. 6325. A special administrator shall be appointed when necessary or proper for the protection of the property or the rights of creditors or other persons interested in the estate, in either of the following cases: . . . 2. In a special proceeding in which probate or general administration is denied because the death of the person whose estate is in question is not satisfactorily proved; but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully made away with."

"Sec. 6328. A special administrator has the same authority as a general administrator to take into his possession personal property, to secure and preserve it, to collect debts due the estate, and to take charge of the real estate and preserve it from waste or other injury and receive the rents, profits and income thereof, and for either of those purposes he may maintain any action or special proceeding. He must also make an inventory and render an account and may sell perishable property or do any other act which he may be specially required to do by direction of the court, but cannot act generally in matters pertaining to the settlement of the estate."

"Sec. 6331. When letters testamentary or of general administration on the estate are granted, the powers of a special administrator cease and he must forthwith deliver to the executor or administrator all the property and effects of the decedent remaining in his hands."

It will be observed that the appointment of a special administrator is to continue, under the terms of the statute, until a general administrator or an executor is appointed. The statute makes no provision for the disposition of the property by the special administrator in case of the return of the person believed to be dead. Nor is there any provision for allowance of his costs or for his compensation in the event of the person returning and demanding his property. The appellant claims that he should be allowed his costs in the proceeding,

on the ground that the statute contemplates taking care of an absentee's property, and does not provide for its final distribution, and that it is, in that view, a valid law. ⁶⁰⁵ Respondent contends that the entire proceeding is based upon an assumption of death, and is one authorizing taking possession of property under the belief that the absentee owner is dead, and holding the same until satisfactory proof of his death is made, and general administration initiated, and that the proceedings in this case are void because taken upon the estate of a living person. Appellant concedes that the estate of a living person cannot be administered and distributed.

We shall not determine in this case whether this statute is applicable to the estate of dead or of living persons, or both, nor whether the statute is unconstitutional, as conferring powers upon the probate court, in respect to preserving the property of absentees, not vested in it by section 111 of the constitution. Conceding, for the purposes of this case only, that such power may be conferred upon the county court in respect to the property of living absentees, we reach the conclusion that the law, so far as it affects the property of living persons, contravenes the provision of the fourteenth amendment of the federal constitution, that persons shall not be deprived of their property without due process of law. The proceedings under which special administrators are appointed in cases like the one at bar follow a refusal to appoint a general administrator on account of the failure of satisfactory proof of the death of the owner of the property to be taken into possession. No additional notice is given after the refusal to appoint a general administrator. The notice previously given as provided by section 6317 of the Revised Codes of 1899 is a notice to all persons interested in the estate, and rests on the assumption that the owner is dead. This is in no sense a notice to the owner of the estate, but is a notice to those interested therein adversely to him: *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896; *Carr v. Brown*, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9, 38 L. R. A. 294. He is not a party to the notice, nor to the proceedings. No hearing is afforded him on any question. The fact that he "has disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully made away with," is adjudicated without any finding of any kind of an attempt to notify him. The possession of the property is transferred to another. The tangible form of

the property is changed by suits and collections. What may be deemed perishable property is sold. Costs and expenses are incurred. ^{was} He is now called upon to pay these expenses, or his property will necessarily be sold to pay them. This is claimed to be done for his benefit, by preserving his property. If this law in fact contemplates the taking possession of the property of a living person, he should have an opportunity to be heard, upon some kind of notice, before the steps are taken; and taking them, without some prescribed notice to him to be given in some way indicated, is depriving him of his property without due process of law. In *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458, it was said: "The general rule unquestionably is that no one is bound by an adjudication of which he had no notice, or to which he was not a party. Testing the present case by this rule, appellee is clearly not bound." In *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, the court said: "As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*." In *Hollingsworth v. Barbour*, 4 Pet. 475, 7 L. ed. 922, the court said: "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded on the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded (or supposed, in law, to be afforded) by a citation or notice to appear, actually served, or constructively, by pursuing such means as the law may in special cases regard as equivalent to personal service." In *Walden v. Craig*, 14 Pet. 154, 10 L. ed. 393, the court said: "It is admitted that the service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and, if jurisdiction be taken where there has been no service of process or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void": See, also, *Boswell v. Otis*, 9 How. 336, 13 L. ed. 164; *Nations v. Johnson*, 24 How. 203, 16 L. ed. 628.

Appellant's contention on the question of notice is that this is a proceeding in rem, and taking possession of the property is ⁶⁰⁷ notice to the owner. The proceedings were taken and the administrator appointed before possession was taken of the property, so that the possession of the property was taken under an order void, as to him, for want of notice. It is the petition that gives the county court jurisdiction to act at all, and the filing of the petition is not followed by giving the owner notice and an opportunity to be heard. He is not bound at all unless he can be bound by void proceedings. We discover no difference in this case from other proceedings in rem in state courts. No contention will be made that in attachment and foreclosure of real estate mortgages by advertisement, and like proceedings, notice would be given to the owner by taking the possession of the property. Even in proceedings strictly in rem, in admiralty courts, notice is generally essential, unless the proceeding is brought against the property, as defendant. In such cases, taking possession is deemed notice to the owner under the federal practice. As was said in *Hollingsworth v. Barbour*, 4 Pet. 475, 7 L. ed. 922: "The course of proceedings in admiralty causes, and some other cases where the proceeding is strictly in rem, may be supposed to be exceptions to this rule. They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly in rem, and in which the thing condemned is first seized, and taken into the custody of the court": See, also, *Lavin v. Emigrant etc. Bank* (C. C.), 18 Blatchf. 224, 1 Fed. 641. Under the cases cited, the taking of the property in this case would not be constructive notice to the owner. It was taken under an order of the county court, made without any notice or pretended notice. It was not taken by virtue of valid process. In *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458, the court said: "But it is said the grant of letters upon an estate is in the nature of a proceeding in rem, and therefore the case in hand does not come within the rule mentioned—that, the proceeding being against the estate itself, those having an interest in it must look out for themselves. Conceding this to be so, what follows? Are we to conclude, because the law confers power upon the probate court to grant administration on a dead man's estate upon a mere *ex parte* petition, that it therefore

follows the court may lawfully make such grant upon a live ~~one~~ man's estate, and that even without giving him an opportunity to be heard?" The absence of notice renders the proceedings void, and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property. We do not refer, in what has been said, to destruction or regulation of property under what is denominated the police power of the state.

It is lastly claimed that the proceedings can be sustained, although based on no notice, and the statute upheld as constitutional, under the police power of the state. No case is cited, and we find none, bringing this case within the regulations of that power. Such power extends to protection of life, health, general welfare, and the property of citizens from injurious results from the actions of others, or in the use of their property, but does not generally go to the extent of depriving them of such property, or its possession, without notice and due process of law. Generally, and except in cases of danger to health or property rights, the exercise of such power is subject to the constitutional guaranty of the fourteenth amendment. It is only in such and other similar cases that property can be taken without notice. "Due process of law" has been defined as follows: "By the 'law of the land' is most clearly intended the general law—a law which hears before it condemns, which proceeds into inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society": *Dartmouth College v. Woodward*, 4 Wheat. 579, 4 L. ed. 629; *Cooley's Constitutional Limitations*, 5th ed., 432; *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337; *City of Ft. Smith v. Dodson*, 51 Ark. 447, 14 Am. St. Rep. 62, 11 S. W. 687, 4 L. R. A. 252. In *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, the court said: "The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title. . . . And he is not bound either by the order of appointing the administrator, or by a judgment in any ~~one~~ suit brought by the administrator against

a third person, because he was not a party to, and had no notice of, either." The effect of holding that the special administrator lawfully took possession of the property in this case would be that a person, by absenting himself as Houg did, subjects his property to be taken and dissipated in paying the expenses of court proceedings. We do not think that such a construction was intended, nor that possession of the property was intended to be taken under such circumstances as are here presented. The property consisted of inanimate personal property. Leaving it, as was done, in no way affected the public, or the public health or welfare. The injury following its abandonment was to Houg alone. If the property was of such character that its presence was injurious to others, or of such character that it should be cared for in order to preserve life or prevent suffering, the general statutes afford ample authority for taking possession of it for such purpose: Rev. Codes 1899, sec. 7560. But the taking of possession of it under this law, in the interests of the absentee, without, at least, notice to him, cannot be done without his consent, under the circumstances of this case; and as the law provides for no notice, it must be held invalid to that extent, at least.

The language of the court in *Moore v. Smith*, 11 Rich. 569, 73 Am. Dec. 122, may be quoted as applicable to this case to some extent: "Under a comparison of the several merits of these parties, blame and laches have been imputed to the plaintiff for his long continued neglect of his property and friends, by which others were misled. Of the reasons of the plaintiff's conduct, we are not informed. It is enough that he was under no legal obligation to stay where his property was, or to give information concerning himself when he was away. He encountered the risk of the statute of limitations, which, if his absence had been a little longer, would have forever barred him."

For a general discussion upon the validity of statutes similar to the one under consideration, see *Woerner's American Law of Administration*, volume 1, section 212.

The judgment is affirmed.

Young, C. J., concurs.

Cochrane, J., having been of counsel in the court below, took no part in the decision.

The Constitutionality of a Statute providing for the administration of the estates of persons presumed to be dead is upheld in *Cunnius v. Reading School Dist.*, 206 Pa. St. 469, 98 Am. St. Rep. 790. But see *Carr v. Brown*, 20 R. I. 215, 78 Am. St. Rep. 835.

CASES
IN THE
SUPREME COURT
OF
OREGON.

BEACH v. STAMPER.

[44 Or. 4, 74 Pac. 208.]

MECHANIC'S LIEN—Separate Buildings.—Where a contractor agrees, under a separate contract for each building, to erect several houses, a subcontractor furnishing material and labor for them under an entire contract cannot file a single lien against all the buildings. (p. 601.)

Otto J. Kraemer, for the appellants.

Hogue & Wilbur and Andrew T. Lewis, for the respondents.

5 **WOLVERTON, J.** This is a suit by F. E. Beach for the foreclosure of a mechanic's lien claimed by him upon four dwelling-houses for materials furnished and used thereon. The defendant Stamper also claims a lien thereon for painting. Prescott, being the trustee for Charles Francis Adams, and the owner in that capacity of lots 5, 6, 11, 12, 13, and 14, in block 19, John Irving's first addition to the city of Portland, entered into four contracts with the defendant King for the erection and completion of the dwelling-houses upon said premises, there being a separate contract with a different consideration as to each, the houses to be separately located and constructed. King subsequently entered into a contract with Stamper whereby the latter, for the consideration of \$615, agreed to furnish the materials and perform the necessary labor for painting, tinting, and staining the four houses according to the specifications of the architect, the value of the services as to each building being designated in the contract as house 1, \$195; house 2,

\$120; house 3, \$100; house 4, \$200. Stamper purchased the materials for the work from the plaintiff, and each filed a claim of lien for the labor and materials furnished and used in the buildings in pursuance of said contract and purchase. Each of said liens is claimed and filed upon all the buildings without segregation, and for a lump sum, Stamper's being for \$122, and the plaintiff's for \$240.61. The lien claimants having prevailed in the trial court, the defendants Prescott, Adams, and King appeal.

"The vital question to be considered is whether the liens claimed by plaintiff and Stamper can legally attach to the four dwellings for the lump sum which each has alleged to be due him. In plaintiff's case the materials were furnished and used indiscriminately upon the buildings. It is so declared in his claim of lien, and it is practically conceded, that the amount or value thereof used upon each house is not susceptible of segregation. In the case of Stamper it is stated generally in his claim of lien that the labor was performed upon all the buildings, but the statement of the account or demand segregates the value performed on each as follows: Labor on house No. 1, \$32; No. 2, \$40; No. 3, \$22; No. 4, \$28. The evidence also tends to support the claim in this form. This court has decided, upon a very careful and clear discrimination of adjudicated cases, that one who, under a single contract for a specified lump sum or price, has performed labor or furnished materials which were used indiscriminately in the construction of several houses, erected separately, but upon adjoining lots owned by the same person, is entitled to claim a lien upon all the houses and lots jointly, and to include them all in one notice: *Willamette Mills Co. v. Shea*, 24 Or. 40, 32 Pac. 759. The controlling feature which induced the decision was that the contract for construction was single, embracing all the buildings for a lump and inseparable sum or price, thus treating the property as a whole and inseverable. "In such case," it is said, "the contract relates to no particular building, but treats them as a whole, though they are, in point of fact, separate and distinct buildings." This is clearly manifest from the cases cited and discussed. *Wall v. Robinson*, 115 Mass. 429, is quoted from in part as follows: "In the case at bar the petitioners have performed labor upon several buildings situated upon the same lot under an entire contract for an entire price. We think such a case is within the purpose of the statute and the intention of the legislature. The parties by

their contract have connected the several buildings, and treated them as one estate. . . . We are of opinion that when labor is performed or furnished under an entire contract in the erection or repair of several buildings owned by the same person and situated upon the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, if the other conditions of the statute are fulfilled." So from *Lax v. Peterson*, 42 Minn. 214, 219, 44 N. W. 3: "But how have the parties to these building contracts treated the property, and not how the owner intends to use it after the completion of the houses, is the question. By contracting for the erection of these four houses under one entire contract, they have connected the two city lots and the several buildings, and treated the whole as one tract or estate." And again, from *Phillips v. Gilbert*, 101 U. S. 721, 725, 25 L. ed. 833: "The contract was one, and related to the row as an entirety, and not to the particular building separately. The whole row was one building, within the meaning of the law, from having been united by the parties on one contract, as one general piece of work."

It is by reason of this condition that the courts have been enabled to construe statutes relative to mechanics' liens which generally employ the term "building," or its equivalent in the singular, as embracing more than structures separately situated, simply because the parties have treated the several structures by their contract as but a single one. In such case the lien asserted may be claimed and maintained upon the whole as if but one structure in fact. The doctrine has been carried even further in *Fullerton v. Leonard*, 3 S. Dak. 118, 52 N. W. 325, thus emphasizing the principle. There two owners, each of a separate lot, joined in a contract for the erection of several buildings. The subcontractor, who furnished materials to be used in the construction of all under an entire contract with the builder, was allowed his single lien against the whole of the several buildings and the two lots upon which they stood as a single structure and estate; the court saying, among other things: "A joint lien upon several buildings, situated upon different lots, owned by the same persons, could not be maintained where a separate contract had been entered into by the owner and contractor; for by the several contract the inference would be that a separate account should be kept with each building. Not so when the contract covered several buildings to be erected for a gross amount without regard to the cost of each. So, if two or more several owners of lots or parcels of

land wish to jointly contract for the erection of several buildings, to be situated upon the several pieces, for a definite and specific sum in gross for all, without regard to the cost of either one, a joint lien may be asserted upon all for any balance due for the erection of such buildings." The contract is, therefore, the controlling feature that unites the several structures and enables the court to say that they are but one building within the spirit and reasonable intendment of the statute. Other cases are cited by the learned chief justice who wrote the opinion in the case alluded to, to the same purpose, but it is unnecessary to refer to them further here.

King, as we have seen, had separate contracts with Prescott, each bearing its own consideration for the construction of each of these buildings. He contracted with Stamper, however, for a single consideration, to perform the work of painting, staining, etc., upon all the buildings, and Stamper prefers a lien upon the whole, and we are to inquire whether Stamper is in a position to invoke the doctrine⁹ settled by the Willamette Mills Company Case. The original contractor, King, was not in a position to claim a single lien upon the whole for any default that might have been made by the builder in the payments stipulated for. This would seem to follow from the principle announced that the contract must form a basis for a lien on the whole, but it is supported by authority as well: 2 Jones on Liens, 2d ed., sec. 1314; *Landers v. Dexter*, 106 Mass. 531; *North & South Lum. Co. v. Hegwer*, 1 Kan. App. 623, 42 Pac. 388; *Fullerton v. Leonard*, 3 S. Dak. 118, 52 N. W. 325; *Currier v. Frederick*, 22 Grant U. C. 243. But the exact question here involved—whether Stamper is entitled to the lien claimed by him—has been decided in *Knauff v. Miller*, 45 Minn. 61, 47 N. W. 313, wherein the court say: "The appellant (a subcontractor) is not entitled to a lien upon both lots for what was done under his entire contract," citing *Landers v. Dexter*, 106 Mass. 531, and continuing: "To charge the whole property with a lien to the extent of the whole contract price would, in effect, impose a lien upon each separate building and lot, not only for the labor and material expended upon it, but for that expended upon other buildings and lots. The distinct independent contracts made by the owner would not have justified the original contractor in claiming a lien upon either lot except for labor or material expended upon the particular lot sought to be so charged, and this subcontractor could secure no such general lien which the original contractor could not have

done." To the same effect is *Larkins v. Blakeman*, 42 Conn. 292.

But it is insisted that these latter authorities should be distinguished because of the language of our statute, whereby it is provided that every contractor, subcontractor, architect, or builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building, shall be held to be the agent of the owner ¹⁰ (*Bel-linger & Cotton's Codes and Statutes (Or.)*, sec. 5640), and that for the purpose of this case King was the agent of the owner in contracting with Stamper, and therefore that the owner is as much bound as if Stamper had contracted with him directly, thus enabling Stamper to claim a single lien upon all the houses. This statute has practically received construction by Mr. Chief Justice Moore in *Fitch v. Howitt*, 32 Or. 396, 408, 52 Pac. 192, wherein he says: "The contractor, being in the nature of a special agent of the owner, with limited power, has authority to bind the property benefited for the payment of the reasonable value of such material only as is ordinarily sufficient properly to construct the building in accordance with the plans and specifications thereof, or in pursuance of the agreement entered into between the owner and contractor." This construction must necessarily be sound. All authority to bind the owner on account of the building or buildings to be constructed must emanate from the original contract, which becomes the fundamental law for the government of all subcontracts, as they must be let under it and by virtue of the contractor's authority obtained through it. If it were otherwise, the contractor could, by the semblance of a construction contract, bind the owner to all sorts of exorbitant conditions, to his manifest injury; and the statute ought not to be construed so as to work any such evil. Applying the principle referred to, it is impossible that Stamper could have obtained a right through his contract with King superior to that which King obtained through his contracts with the owner—that is, the right to file a single lien against all the buildings—when King had no such authority. Stamper's case cannot be distinguished, therefore, from *Knauft v. Miller*, 45 Minn. 61, 47 N. W. 313, and *Larkins v. Blakeman*, 42 Conn. 292, and we are impelled to the conclusion that he is not entitled to a lien according to the manner in which he has filed his claim. Nor ¹¹ does Beach stand in any better light, as his contract was with Stamper, and his claim of lien is also without validity.

Other questions were presented, but this one disposes of the case, making it unnecessary to discuss them. The decree of the circuit court will therefore be reversed, and one here entered dismissing the complaint and cross-bill of Stamper.

A Mechanic's Lien will attach to all the lots when materials have been furnished under a single contract for buildings erected on two or more contiguous lots owned by the person to whom the materials were furnished. If the owner does not see fit to make separate contracts for the material to be used on each lot, he cannot deny that the lien attaches to all the lots upon which the material was used: *Lyon v. Logan*, 68 Tex. 521, 2 Am. St. Rep. 511. See, too, *Maryland Brick Co. v. Spilman*, 76 Md. 337, 35 Am. St. Rep. 431.

GOLD RIDGE MINING COMPANY v. TALLMADGE.

[44 Or. 34, 74 Pac. 325.]

SALE OF WATER—Implied Warranty of Quality.—If one contracts to deliver water to another for mining purposes, the law implies a warranty that the water shall at least not be unfit for the required purpose on account of the contractor's own conduct. (p. 606.)

SALE OF WATER—Waiver of Warranty of Quality.—If one contracts to deliver water to another for mining purposes, and the water proves unfit for that purpose, a compliance with the contract is not waived by an attempted use under protest and in reliance of a promise to correct the difficulty. (p. 606.)

Thomas H. Crawford, for the appellant.

Frank L. Moore, for the respondent.

37 BEAN, J. The plaintiff corporation is the owner of a placer mine on Thorn Gulch, near Sparta, in Baker county. The defendant, F. W. Tallmadge, owns a mine at the head of the gulch above the plaintiff's. He is also the owner of a water right and ditch known as the "Sparta ditch," through which water is conveyed from Eagle creek to a point above, but near, the town of Sparta. Between the Sparta ditch and the head of Thorn gulch is a low depression, owing to which water from the ditch could not be used for mining purposes on Thorn gulch at the time the contract in controversy was made. In July, 1897, the plaintiff sought to obtain water from defendant F. W. Tallmadge for use at its mine, and applied to him to extend his ditch so as to supply it with water; but, as he did not have funds available for this purpose, a written

contract was entered into between him and the plaintiff, wherein the latter agreed to furnish all the labor, money, and material necessary to lay a sixteen inch steel pipe line from a point at or near the reservoir on defendant's ditch across the low land to the opposite ridge of hills near the head of Thorn gulch, a distance of three thousand six hundred and fifty feet, and in payment therefor the defendant agreed "to deliver there, through and by such appliances as he may adopt, at least two hundred full miner's inches of first or second water to and at the placer mines of" the plaintiff, "and to maintain said supply of water at said point continuously so long as water will flow in said ditch," until the plaintiff should be fully repaid in water for the cost and expense of constructing such pipe line at the rate of twenty dollars a day for each day of twenty-four hours. The ^{as} plaintiff complied with all the terms of the contract on its part, and put in the pipe line at a cost of two thousand nine hundred and forty-two dollars and ninety-seven cents, and soon thereafter filed a lien on the Sparta ditch, its feeders, laterals, reservoirs, and appurtenances, to secure the payment of the amount so expended. After the completion of the pipe line the defendant turned into it from his ditch water which he used in mining his own ground at the head of the gulch and then allowed the quantity which he agreed to furnish the plaintiff to flow down the natural channel of the gulch to the mine of the plaintiff without being slummed or the tailings removed therefrom, and so loaded with sand, mud, and debris as to be useless for mining purposes.

Farlaman, who was the manager of the plaintiff company from July to November, 1897, testified that the water as it came down to the plaintiff from the defendant's mine was filled with mud, sand and gravel just as it came from the mine and was of very little use to the plaintiff; that it filled the plaintiff's reservoirs and ditch so full that they were of no use at all; that it kept two or three men busy all the time shoveling the sand from the ditch; that the water was two-thirds sand; that he spoke to the defendant about it several times, and he promised to remove the trouble, but never did; that, as delivered, the water was of no value to the plaintiff. Banfield, who was superintendent for the plaintiff in 1898, and in charge of its mine, says that during that season the water was delivered during the first week clean, but after that it was used by the defendant, and the tailings and debris from

his mine were carried down to plaintiff's to such an extent that it would fill the ditches so that the water ran out over the ground instead of down the ditches; that it also filled the sluice-boxes and penstock, and cut the giant to pieces. George C. Sears, president of the plaintiff company, testified that the water as it came down to plaintiff's mine was about ³⁹ one-half debris, and of such a character that it could not be used through the pipe; that all the tailings and wash from the defendant's mine came down with the water; that the plaintiff could not use the water for any purpose; that it took two-thirds of the time of plaintiff's employes to keep the mine clean, and because of the condition of the water the plaintiff could not mine at all; that plaintiff has been to considerable expense in preparing to use the water, and did not get any substantial benefit from its use. Colonel Drake, a member of the plaintiff company, says that the water as it came down from the defendant's mine was loaded with a sort of granite or quicksand; that it came down heavily charged with such material from the workings above; that it was hard to describe the material, but it would roll right along with the water, and fill the ditches and tailraces very readily; that it was the debris and tailings from the defendant's mine that came down with the water, and that it was not possible to mine with the water in its then condition; that plaintiff was not able to make a clean-up with the water. Mr. Morrill says that he was on the mining ground the season of 1897, while Farlaman was in charge; that the water which the plaintiff was trying to use could hardly be called water; that it might more properly be called granite sand mixed with water.

1. From this testimony, which is not contradicted in any way, it is clear that the condition of the water as delivered at the plaintiff's mine was such that it could not successfully be used for placer mining, but filled the reservoirs, ditches, and penstock with sand and debris, and thus practically made a dumping ground of the plaintiff's property for the tailings from the defendant's mine. The plaintiff, deeming that the delivery of the water in the condition referred to was not a compliance with the stipulations of the agreement, brought this suit to foreclose its lien, ⁴⁰ and the single question for consideration is whether the defendant F. W. Tallmadge has complied with his contract. By it he agreed to deliver "to and at the placer mines of the plaintiff" two hundred miner's inches of first or second water. There is much testimony in

the record as to the meaning of the term "second water" in mining parlance. The witnesses all agree that it means water that is used by a lower proprietor after it has been used by an upper one for mining purposes, and they also agree that after water has once been used for placer mining it cannot again be successfully used until the tailings and soil carried with it have been removed by slum or settling dams, or in some other suitable way. The witnesses do differ, however, as to whose duty it is, in the absence of an agreement, to provide dams or reservoirs for removing tailings and debris; those for the plaintiff testifying that under the general custom of miners it is the duty of the seller of second water to remove the tailings and debris and put it in condition for use, while those for the defendant state that the custom in and about Sparta is for the purchaser to take the water as it comes from the sluices and tailraces of the first user, and himself provide means for removing the material carried therein. The witnesses, therefore, do not differ as to the definition of "second water," nor as to the necessity of removing the debris and tailings before it can be used again, but only as to whether it is the duty of the seller or the buyer, in the absence of an agreement on the subject, to remove the debris. But we do not regard the question of the general custom as material in this case, because the contract, as we interpret it, determines the rights of the parties. The defendant, F. W. Tallmadge, was the owner of a ditch and water right and a dealer in water. The plaintiff applied to him to purchase water for mining purposes. In order to supply the water it was necessary for the defendant to extend his ditch. He did not have the money ⁴¹ available for that purpose, and therefore entered into an agreement with the plaintiff, whereby it should construct for him the necessary extension and pay the cost thereof in the first instance, he agreeing to reimburse it for the money thus expended by selling to it a given quantity of water, at a specified rate. By the terms of the contract he was to deliver the water to the plaintiff at its mine, a mile or a mile and a half below his own property, and not at the end of his sluices or tailraces, nor was the plaintiff to take the water in the condition it came from his mine. The delivery was to be made by him through such appliances as he might adopt "to and at the placer mines of the plaintiff," and for mining purposes. Under the contract, he, and not the plaintiff, had control of the water till it reached the place of delivery, and, as

the evidence all shows that it could not be used for the purpose for which it was sold by him and purchased by the plaintiff until freed from its load of debris, it would seem clear that he could not by his own act render it unfit for use, and then insist that he had complied with his contract.

It is settled law that, where an article or commodity is to be made or supplied to a purchaser for a particular purpose known to the seller, there is an implied warranty that it shall be reasonably fit and suitable for the purpose intended: Benjamin on Sales, 7th ed., 633, 686; 2 Schouler on Personal Property, sec. 346; 10 Am. & Eng. Ency. of Law, 1st ed., 149; Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; McClamrock v. Flint, 101 Ind. 278; Bushman v. Taylor, 2 Ind. App. 12, 50 Am. St. Rep. 228, 28 N. E. 97. Now, the water which Tallmadge agreed to deliver to the plaintiff was to be used for certain purposes, known to him at the time he made the contract, and therefore the law implies a warranty on his part that when delivered it shall at least not be unfit for the required purpose on account of his own conduct. The contradicted testimony shows that the ⁴² water as delivered by the defendant at the plaintiff's mine was not suitable for use, nor could it be used, for mining purposes, in its then condition, and this, in our opinion, was not a compliance by the defendant with the terms of his contract. To construe the contract as contended for by him would be to allow him to use the plaintiff's property as a dumping ground for the tailing and mining debris from his mine—a right which the law does not give him (Carson v. Hayes, 39 Or. 97, 65 Pac. 814), and which it would be unreasonable to suppose that the plaintiff vested in him by contract.

There is a contention made that the debris which came down with the water to plaintiff's mine did not come from the mining operations of the defendant, but was gathered by the water as it passed down the gulch after leaving his mine. The evidence on this question is overwhelmingly in favor of the plaintiff, and there can be no reasonable doubt on this record as to the true facts of the matter. The evidence shows that for about one week, while the defendant was not mining, the water came down to the plaintiff's mine clear and in condition for use, but as soon as he began operating his mine it was so charged with sand, dirt and mining debris that it could not be used for mining purposes.

2. There is also a contention made in the brief that the plaintiff waived a compliance with the contract by accepting and using the water as it actually came down to its mine. The evidence shows, however, that the attempted use was made under protest, and in reliance on the promise of the defendant to correct the difficulty. Taking the record as a whole, we are of the opinion that the defendant did not comply with his contract, and that plaintiff is entitled to the relief demanded in its complaint. The decree of the court below will therefore be reversed, and one entered here as prayed for.

WARRANTIES OF QUALITY IMPLIED IN SALES.

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I. Rule of Caveat Emptor.

a. In General.—If goods which are the subject of a sale are in existence, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim of caveat emptor applies, even though the defects are latent and not discoverable upon examination, at least if the seller is neither the grower nor the manufacturer.

In such a case the buyer has an opportunity to exercise his own judgment; and if the result of the inspection proves unsatisfactory, or if he distrusts his own judgment, he may exact a warranty. But a warranty will not ordinarily be implied as to the quality or condition of the goods. This doctrine, while well established, is subject to several qualifications which will presently be given attention: *West v. Cunningham*, 9 Port. 104, 33 Am. Dec. 300; *Morris v. Thompson*, 85 Ill. 16; *Telluride Power etc. Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319; *National Oil Co. v. Rankin (Kan.)*, 75 Pac. 1013; *Kircher v. Conrad*, 9 Mont. 191, 18 Am. St. Rep. 731, 23 Pac. 74, 7 L. R. A. 471; *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266; *Hargous v. Stone*, 5 N. Y. 73; *Erwin v. Maxwell*, 3 Murph. 241, 9 Am. Dec. 602; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741; *Westmoreland v. Dixon*, 4 Hay. 223, 9 Am. Dec. 763; *Good v. Johnson*, 53 Tenn. (6 Heisk.) 340; *Stevens v. Smith*, 21 Vt. 90; *Reynolds v. Palmer*, 21 Fed. 433; *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39; *Jones v. Just*, L. R. 3 Q. B. 197.

b. As Affected by Particular Circumstances.

1. *Knowledge of Defects.*—If, as stated above, there is in ordinary sales no warranty implied against latent defects, clearly the law will raise no warranty by implication against patent defects or defects of which the buyer has knowledge: *Byrd v. Campbell Printing Co.*, 90 Ga. 542, 16 S. E. 267; *Richardson v. Johnson*, 1 La. Ann. 389; *Miller v. Yarborough*, 1 Rich. 48; *Carleton v. Jenks*, 80 Fed. 937. But if a defect is latent, and is known and concealed by the seller, the rule of caveat emptor does not apply: *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407.

2. *Inspection of Goods.*—Where goods are in esse and may be examined by the buyer, and there is no fraud on the part of the seller, there usually is no implied warranty of quality, even though the goods contain defects not discoverable on examination, where the seller is neither the grower nor the manufacturer: *Barnett v. Stanton*, 2 Ala. 195; *Earl v. Westfall Com. Co.*, 70 Ark. 61, 66 S. W. 148; *Moore v. McKinlay*, 5 Cal. 471; *Becker v. Brawner*, 18 Ill. App. 39; *Raymer v. Rees*, 58 Ill. App. 292; *Bowman v. Clemmer*, 50 Ind. 10; *Horner v. Parkhurst*, 71 Md. 110, 17 Atl. 1027; *Dickson v. Jordan*, 11 Ired. 166, 53 Am. Dec. 403; *Carson v. Baillie*, 19 Pa. St. 375, 57 Am. Dec. 659; *Vanderhost v. MacTaggart*, 1 Brev. 269, 2 Am. Dec. 667; *Sullivan v. Huff*, 24 S. C. 348; *Joy v. National Ex. Bank (Tex. Civ. App.)*, 74 S. W. 325; *T. B. Scott Lumber Co. v. Haftner-Lotham Mfg. Co.*, 91 Wis. 667, 65 N. W. 518. But see *Cochran v. Jones*, 85 Ga. 678, 11 S. E. 811. The fact that the quality of the goods is difficult to ascertain will not result in an implication of warranty. Thus, in *Hart v. Wright*, 17 Wend. 267, it is held that a warranty will not be implied from the difficulty of ascertaining the quality of flour, although it is fair to appearance as the best flour, and can-

not be known by mere inspection to be made of grown wheat. There is no implied warranty in a sale of baled hemp that the interior of the bales corresponds with the exterior: *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437.

On the other hand, where goods are sold without an opportunity on the part of the buyer to make an inspection, a warranty of quality or fitness is generally implied. The rule of caveat emptor does not apply to such a case: *Huntington v. Lowe*, 3 La. Ann. 377; *Gallagher v. Waring*, 9 Wend. 20; *Morse v. Union Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Merriam v. Field*, 89 Wis. 578; *Jones v. Jost*, L. R. 3 Q. B. 197. It is said, however, that this principle applies only where inspection is, morally speaking, impracticable, as where goods are sold before arrival or landing: *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276.

3. **Sound Price.**—There are strong intimations in some of the decided cases that the selling of an article for a sound price raises a warranty in law that it is of sound quality: *Bailey v. Nichols*, 2 Root, 407, 1 Am. Dec. 83; *Torris v. Long*, 1 N. C. 111; *Timrod v. Schoolbred*, 1 Bay, 324, 1 Am. Dec. 620; *Smith v. McCall*, 1 McCord, 220, 10 Am. Dec. 666; *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776. This theory, however, has been quite generally discredited, and it is believed that the mere fact that goods are sold for a full or sound price does not raise an implied warranty that they are sound or of good quality: *West v. Cunningham*, 9 Port. 108, 33 Am. Dec. 300; *Dean v. Mason*, 4 Conn. 428, 10 Am. Dec. 162; *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 718; *Johnston v. Cope*, 3 Har. & J. 89, 5 Am. Dec. 423; *Mixer v. Coburn*, 52 Mass. (11 Met.) 559, 45 Am. Dec. 230; *Beninger v. Corwin*, 24 N. J. L. 257; *Holden v. Dakin*, 4 Johns. 421; *Weimer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411; *King v. Quidnick Co.*, 14 R. I. 131; *McKinney v. Fort*, 10 Tex. 220; *Mason v. Chappell*, 15 Gratt. 572.

4. **Express Warranty.**—It is sometimes said that it is only in the absence of an express warranty that resort can be had to an implied one (*Malby v. Young*, 104 Ga. 205, 30 S. E. 854; *Moultrie Repair Co. v. Hill* (Ga.), 48 S. E. 143); and that where, in a contract of sale, there is an express warranty in one particular or as to one quality, the law will not imply a warranty in respect to other particulars or qualities. Or, as it is sometimes stated, an express warranty of certain qualities in the article sold excludes an implied warranty of other qualities: *Barnes v. Blair*, 16 Ala. 71; *Holcombe v. Cable Co.*, 119 Ga. 466, 46 S. E. 671; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *McGraw v. Fletcher*, 85 Mich. 104; *Deming v. Foster*, 42 N. H. 165; *Lanier v. Auld*, 1 Murph. (N. C.) 138, 3 Am. St. Rep., Vol. 102—39

Am. Dec. 680; *Buckstaff v. Russell*, 79 Fed. 611, 25 C. C. A. 129. Thus it has been held that when there is an express warranty of quality of the goods sold, no warranty of fitness for the particular use intended is implied: *Reeves v. Byers*, 155 Ind. 535, 58 N. E. 713; *International Pavement Co. v. Smith*, 17 Mo. App. 264; *Wood Machine Co. v. Bobbst*, 56 Mo. App. 427; *J. I. Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. 1013; *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414, 90 N. W. 444.

We are inclined to the opinion, however, that the presence of an express warranty in a contract of sale does not necessarily preclude a warranty by implication, when the two are not incompatible: See *Wilcox v. Owens*, 64 Ga. 601; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626; *Biggs v. Parkinson*, 7 Hurl. & N. 955, 31 L. J. Ex. 301. Thus, in *Blackmore v. Fairbanks*, 79 Iowa, 282, 44 N. W. 548, it is decided that an implied warranty that machinery shall be fit for the purpose for which it is intended is not excluded by an express agreement that it shall be of a certain power, and in good condition except from exposure to the weather. Said the court: "A warranty will not be implied in conflict with the expressed terms of the agreement; but there is no conflict of that kind in this case. The implied warranty that the machinery is fit for the use for which it was purchased is in harmony with the provisions specifying the power of the engine and boiler, and that it should be in good order, except from exposure to the weather."

"An implied and an express warranty may exist under the same contract, as when the expressed does not relate to the obligations created by the implied; but when the expressed warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed": *Bucy v. Pitts Agri. Works*, 89 Iowa, 464, 56 N. W. 541. "The general rule denies an implied warranty as to any matter or particular which may be brought within the purview or intendment of the special warranty. But there may be an implied warranty so wholly independent of anything contemplated in the express warranty as to stand by virtue of its own distinctive force. In other words, the two warranties may be so distinct and separate that both may stand at the same time and both be enforced": *Aultman, Miller & Co. v. Hunter*, 82 Mo. App. 632. That the law will not imply a warranty in respect to matters covered by an express warranty, see *White v. Gresham*, 52 Ill. App. 399.

An express warranty of title does not exclude an implied warranty of soundness: *Costellano v. Peillon*, 2 Mart., N. S., 466; *Houston v. Gilbert*, 8 Brev. 63, 5 Am. Dec. 542; *Trimmier v. Thomson*, 10 S. C. 164. But see *Wren v. Wardlaw*, Minor, 363, 12 Am. Dec. 60.

If the vendor of a machine tenders an express warranty upon con-

ditions which are not performed by the vendee, there may be a waiver of the benefits to be derived therefrom, so that the warranty implied by law will govern the transaction: *Parsons Band Cutter etc. Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580.

5. **Refusal to Warrant.**—If a vendor refuses to warrant the quality or soundness of the article which he offers for sale, this will ordinarily negative any implied warranty: *Smith v. Bank of the State*, *Riley Eq. (S. C.)* 113; *McLean v. Green*, 2 *McMull. (S. C.)* 17; *Farr v. Gist*, 1 *Rich. (S. C.)* 68. See, too, *Fauntleroy v. Wilcox*, 80 *Ill.* 477; *Lynch v. Curfman*, 65 *Minn.* 170, 68 *N. W.* 5; *Hardt v. Western Elec. Co.*, 82 *N. Y. Supp.* 835, 84 *App. Div.* 249. Thus, an express declaration by the vendor that he warrants nothing but the title to the chattel precludes an implied warranty of its soundness: *Boinest v. Leigne*, 2 *Rich. (S. C.)* 464. What amounts to a refusal to warrant is usually a question for the jury: *Harbersham v. Rodriguez*, 1 *Spear (S. C.)*, 314.

6. **A Usage or Custom or rule of trade** is not usually admissible to show that a warranty is implied in a contract of sale when by law it is not, or that a warranty is not implied where the law does imply one: *Chicago etc. Provision Co. v. Tilton*, 87 *Ill.* 547; *Baird v. Matthews*, 36 *Ky. (6 Dana)* 129; *Whitmore v. South Boston Iron Co.*, 84 *Mass. (2 Allen)* 52; *Dickinson v. Gay*, 89 *Mass. (7 Allen)* 29, 83 *Am. Dec.* 656; *Thompson v. Ashton*, 14 *Johns.* 316; *Wetherill v. Neilson*, 20 *Pa. St.* 448, 59 *Am. Dec.* 741; *Stamps v. Tennessee etc. Marble Co. (Tenn. Ch.)*, 59 *S. W.* 760; *McKinney v. Fort*, 10 *Tex.* 220; *Barnard v. Kellogg*, 77 *U. S. (10 Wall.)* 383, 19 *L. ed.* 987. There are some decisions, however, which are hardly reconcilable with this statement: *Sumner v. Tyson*, 20 *N. H.* 384; *Fatman v. Thompson*, 2 *Dism.* 482; *Snowden v. Warder*, 3 *Rawle*, 101.

II. Scope of Implied Warranty.

a. **Highest Quality of Goods.**—An implied warranty of quality is not a guaranty that the article sold is the best of its kind, or that it is such as may have been represented at the time of the sale, but only that it shall be reasonably suitable for the purposes for which it is intended to be applied: *Hodge v. Tufts*, 115 *Ala.* 366, 22 *South.* 422; *Tennessee River etc. Co. v. Leeds*, 97 *Tenn.* 574, 37 *S. W.* 889; *Harris v. Waite*, 51 *Vt.* 481, 31 *Am. Rep.* 694.

b. **Merchantability of Goods.**—But where there is a contract for the sale of an article, without opportunity for inspection, the thing to be furnished must ordinarily be something more than the thing mentioned in the contract. It must at least be merchantable and free from remarkable defects, and the law implies a warranty to this effect. This doctrine seems equally applicable to cases where the goods are to be manufactured and where they are already on hand, and to cases where the goods are intended for resale and where

they are not: *Bunch v. Weil* (Ark.), 80 S. W. 582; *Snowden v. Waterman*, 100 Ga. 588, 28 S. E. 121, 88 L. R. A. 721; *McClung v. Kelley*, 21 Iowa, 508; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636, 45 N. E. 856; *Dowdle v. Bayer*, 41 N. Y. Supp. 184, 9 App. Div. 308; *Rogers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Halloway v. Jacoby*, 120 Pa. St. 583, 6 Am. St. Rep. 737, 15 Atl. 487; *Standard Rope etc. Co. v. Olman*, 13 S. Dak. 296, 83 N. W. 271; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *English v. Spokane Com. Co.*, 57 Fed. 451, 6 C. C. A. 416.

This rule applies to a sale of fruit not yet in existence (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248. But see *Davis v. Murphy*, 14 Ind. 158), to a sale of onion sets to a merchant by description (*Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54, 32 South. 494), to a sale of corn (*Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560), to a sale of wheat in the sack (*Fish v. Rosebury*, 22 Ill. 288), to a sale of commercial fertilizer (*Walters v. Croasdale*, 43 Ga. 204. Compare "Commercial Fertilizers," post), to a sale of beer (*Honsen v. United States Brewing Co.*, 70 Ill. App. 265), to a contract to print and bind books (*Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592), and to a sale of ice: *Murchie v. Cornell*, 155 Mass. 60, 81 Am. St. Rep. 526, 29 N. E. 207, 14 L. R. A. 492. Compare *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39, where it is held that when one sells the ice stored in certain houses, which he did not put up but bought after it was stored, and has never seen, there is no implied warranty that it is all merchantable, if he states these facts to the vendee and informs him from whom the ice was originally purchased and that he has no further information as to its condition and quality than the representations of such seller. There is no implied warranty of merchantability on a sale of refuse material resulting from the process of manufacture: *Holden v. Clancy*, 58 Barb. 590.

c. Deterioration in Transit.—Where goods of a perishable nature are ordered from a distance, a warranty may be implied that they are properly packed and fit for shipment, but not that they will remain sound for any particular or definite length of time. The implied warranty extends only to the condition of the goods when they leave the vendor's possession, and he is not liable for any deterioration resulting from the transit: *Leggat v. Sands' Ale Brewing Co.*, 60 Ill. 158; *Mann v. Everston*, 32 Ind. 355; *Leopold v. Van Kirk*, 27 Wis. 152; *English v. Spokane Com. Co.*, 57 Fed. 451, 6 C. C. A. 416; *Bull v. Robinson*, 10 Ex. 342, 24 L. J. Ex. 165.

III. Particular Kinds of Sales.

a. By Sample.—When goods are sold by sample, a warranty is implied that the sample is a true representative of the goods, and that the bulk of the commodity is of quality equal to the sample

and corresponds with it in kind and character: *Magee v. Billingsley*, 8 Ala. 679; *Hughes v. Bray*, 60 Cal. 284; *Love v. Barnesville Mfg. Co.*, 8 Penn. 152, 50 Atl. 536; *Spring v. Woolen Mills*, 106 Ill. App. 579; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Phillipi v. Gove*, 4 Rob. 315; *Hall v. Plassan*, 19 La. Ann. 11; *Osgood v. Lewis*, 2 Har. & G. 495, 18 Am. Dec. 317; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Ideal Wrench Co. v. Garvin Machine Co.*, 72 N. Y. Supp. 662, 65 App. Div. 235; *Dayton v. Hooglund*, 39 Ohio St. 671; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Wilkerson v. Randle* (Tex. Civ. App.), 29 S. W. 431; *Pontiac Shoe Mfg. Co. v. Hamilton*, 18 Tex. Civ. App. 283, 44 S. W. 405; *Hume v. Sherman Oil etc. Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390; *Willings v. Consequa*, Pet. C. C. 301, Fed. Cas. No. 17,767; *Fraley v. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486; *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176; *Selser v. Roberts*, 105 Pa. St. 242. And it matters not that the sample was made by the warehouseman, especially where it passes through the vendor's hands to the vendee: *Whittaker v. Hueske*, 29 Tex. 355.

There is a sale by sample, within the meaning of the foregoing rule, when a purchaser of indigo judges thereof from a specimen which he takes from an opening in the case: *Williams v. Spafford*, 25 Mass. (8 Pick.) 250. A sale of packed cotton is ordinarily a sale by sample: *Boorman v. Jenkins*, 12 Wend. 566, 27 Am. Dec. 158; and the drawing of fresh samples by a purchaser of such cotton to ascertain if they correspond with the first samples does not make the sale any the less a sale by sample: *Beebee v. Robert*, 12 Wend. 413, 27 Am. Dec. 132. But a sale by sample does not take place when the purchaser of several bales of hemp cuts open and examines some of them and has an ample opportunity to do so with the rest: *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437.

"A sale by sample is where a small quantity of any commodity is exhibited by the vendor as a fair specimen of a larger quantity, called the bulk, which is not present, and there is no opportunity for a personal examination. To constitute such a sale, it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing in regard to the quality of the bulk": *Reynolds v. Palmer*, 21 Fed. 433, 435. "It is necessary in making the sale that the sample should be so used between the buyer and seller as to express or become a part of the contract, or, in other words, that the sample should amount to and take the place of an express averment by the seller of the condition and quality of the goods sold, upon which the buyer relies in making the purchase. The mere exhibition of a sample by the seller and examination of it by the buyer does not amount to such an averment, unless, from all the facts and circumstances of the

case, it can be presumed that an understanding is arrived at between the parties that the bulk is to correspond with the sample. . . . To effect a sale by sample, so as to bind the seller for a correspondence in bulk, it must be shown that the seller adopts the sample as his own description of the bulk, and that the buyer concludes the purchase upon the faith and credit of the description so given": *Gunther v. Atwell*, 19 Md. 157, 168. "Whether a sale be a sale by sample or not, is a question of fact for the jury to find from the evidence in each case; and to authorize a jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited. That they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it; or, in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was intended by the parties as a sale by sample": *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

There is a warranty that each package of the article shall correspond with the sample when there are no circumstances to qualify the transaction. But if the commodity consists of several varieties and qualities, and the sample is made by mixing proportional parts of the different varieties and qualities, the warranty is that the whole quantity, if mingled together, would be of a quality equal to the sample: *Leonard v. Fowler*, 44 N. Y. 289. The commodity in question in this case was beans.

If goods are not only sold by sample but by description as well, with an express warranty, that it should correspond with both the description and the sample, it is not sufficient that the bulk of the goods corresponds with the sample, if they do not also correspond with the description, for there is a twofold warranty of conformity to sample and quality: *Miamisburg Twine etc. Co. v. Wholhuter*, 71 Minn. 484, 74 N. W. 175.

An opportunity for inspection does not necessarily preclude a warranty of quality on a sale by sample or description: *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455, 22 N. E. 47, 5 L. R. A. 213. But see *Hargous v. Stone*, 5 N. Y. 73, 92; "Description," post.

b. **By Description.**—The sale of an article by a particular description imports a warranty that it is of the kind, brand, or description specified: *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783, 22 Atl. 362, 13 L. R. A. 224; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 763, 23 N. E. 372; *Lenz v. Blake*, 44 Or. 569, 76 Pac. 356; *Borrekens v. Bevan*, 3 Rawle, 23, 23 Am. Dec. 85. For example, if a buyer orders "pure manila twine," and the order is filled with

manila twine, there is an implied warranty that the commodity delivered is "pure manila twine": *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563, 67 N. W. 298. So, if a buyer orders brick of the grade known as "common," there is an implied warranty that they are of that description: *Wisconsin Red Pressed Brick Co. v. Hood*, 60 Minn. 401, 51 Am. St. Rep. 539, 62 N. W. 550.

An opportunity for inspection does not necessarily do away with the effect of the warranty: *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455, 22 N. E. 47, 5 L. R. A. 213; *Long Bros. v. Armsby*, 43 Mo. App. 253; *Jones v. Just*, L. R. 3 Q. B. 197. But see *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288.

But there is generally no further warranty than that the article is of the kind specified. A sale of tobacco as being of "Parkin's Crooked Brand" imports no warranty as to the quality of the tobacco further than that it is of that brand: *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276. And where a "No. 4 safe with a combination lock" is ordered of a manufacturer of safes, and a safe answerable to that ordered is supplied, there is no implied warranty, it is said, as to the merit or usability of the lock: *Tilton Safe Co. v. Tisdale*, 48 Vt. 83. A contract for the delivery of coal designated by its trade name carries no implied warranty of fitness for any particular purpose: *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587. But see *Miller v. Moore*, 83 Ga. 684, 20 Am. St. Rep. 329, 10 S. E. 360, 6 L. R. A. 374.

"The rule is well settled," to quote from a recent New Jersey decision, "that when an article is sold by a description, by its known designation, and the purchaser has an opportunity for inspection, the only warranty which is implied by the sale is that the thing sold is of the kind specified. Where the buyer has no opportunity to inspect, there is, in addition to the implied warranty that the article is of the kind specified, a further warranty, by implication, that it is salable, or merchantable. But unless it be expressed in the contract, there is no warranty that the article is of any particular quality, and this is the case whether an opportunity for inspection be afforded the vendee or not. The cement which was the subject matter of the sale in the present case was purchased by its known designation, that is, as 'Atlas Portland Cement,' and, consequently, there was no implied warranty of its quality": *Ivans v. Laury*, 67 N. J. L. 153, 50 Atl. 355.

c. By a Manufacturer.

1. **In General.**—A manufacturer who sells an article of his own making impliedly warrants that it is free from latent defects arising from the process of manufacture or the use of defective materials: *Beers v. Williams*, 16 Ill. 69; *Bierman v. City Mills Co.*, 151

N. Y. 482, 56 Am. St. Rep. 636, 45 N. E. 856, 37 L. R. A. 799; *Baylis v. Weibezahl*, 85 N. Y. Supp. 355, 42 Misc. Rep. 178; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290. "The fair presumption is, that he understood the process of its manufacture, and was cognizant of any latent defects caused by such process and against which reasonable diligence might have guarded. . . . When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture": *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. Rep. 537, 28 L. ed. 86. It would seem that the manufacturer is not liable for latent defects, unless he can be presumed to know of their existence: *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163. The following is an extract from *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 64 Am. St. Rep. 418, 69 N. W. 1091: "In *Randall v. Newson*, L. R. 2 Q. B. D. 102, the court held the manufacturer to be an absolute insurer against all latent defects, and liable for all damages caused by such defects; and this seems to be the holding of the court in *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290. We are of the opinion that such an extraordinary responsibility is not, by the principles of the law, imposed on the manufacturer. The correct rule was applied in *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102, and *Archdale v. Moore*, 19 Ill. 565, approved in *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294, where it is held that the manufacturer is liable only for failing to exercise the proper degree of care and skill in the selection of material, and in the manufacture of the same, and that he impliedly warrants that he has done this."

The very reason of the rule excludes its application to property not manufactured by the vendor: *Reynolds v. Mayor*, 57 N. Y. Supp. 106, 39 App. Div. 218. In a sale between merchants no warranty of the manufacturer exists: *Dickinson v. Gay*, 7 Allen, 656, 83 Am. Dec. 656. And one who turns and prepares a shaft to be applied to some particular use is not liable on an implied warranty for a defect in its original manufacture, and not discoverable by inspection: *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102.

A manufacturer's printed warranty remaining pasted on an article when sold by a dealer who has purchased from such manufacturer and sold to a third person without any express representation or warranty, does not bind the dealer: *Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503, 92 N. W. 478, 60 L. R. A. 311.

2. For a Particular Purpose.—Where a manufacturer contracts to supply an article of his own make or manufacture, to be applied to a particular purpose, so that the buyer necessarily trusts to the

judgment and skill of the manufacturer, the law implies a warranty that it shall be reasonably fit for the purpose to which it is to be applied. This implies that the workmanship and material shall be good, and that the article shall be reasonably adapted to the uses for which it is made and sold: *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Murray Iron Works v. De Kalb Elec. Co.*, 103 Ill. App. 78; *Brenton v. Davis*, 8 Blackf. 317, 44 Am. Dec. 769; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Poland v. Miller*, 95 Ind. 387, 48 Am. Dec. 730; *Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 429, 55 Atl. 447; *West Mich. Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Brown v. Murphee*, 31 Miss. 91; *Charlotte etc. R. R. Co. v. Jesup*, 44 How. Pr. 447; *Thomas v. Simpson*, 80 N. C. 4; *Pease v. Sabin*, 58 Vt. 432, 91 Am. Dec. 364; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Moore v. The Charles Morgan*, Fed. Cas. No. 9754; *Dawes v. Peebles*, 6 Fed. 856; *Nashua Iron etc. Co. v. Brush*, 91 Fed. 213. Firewood is not a manufactured article, within this rule: *Correio v. Lynch*, 65 Cal. 273, 3 Pac. 889.

To quote from Justice Harlan: "According to the principles of the decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own. In ordinary sales, the buyer has the opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller, as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of

the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the same time being informed of the purpose to devote it to that use": *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. Rep. 537.

"The test in such cases is whether the purchaser trusts and relies upon the judgment of the manufacturer, and not upon his own": *J. I. Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. 1013. If he has had an opportunity to inspect the article during its manufacture, and relies on his own judgment, no implied warranty arises: *Dodge v. Dickson Mfg. Co.*, 113 Fed. 210, 51 C. C. A. 175; nor does such a warranty arise when he designates the kind of material to be used: *Shoenberger v. McEwen*, 15 Ill. App. 496; *Cunningham v. Hall*, 86 Mass. (4 Allen) 268.

The manufacturer does not impliedly warrant that the article is perfect, or of the best quality, or the best for the purpose intended, but only that it is reasonably fit and proper for the use designed: *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Tennessee River etc. Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389; *Harris v. Waite*, 51 Vt. 480, 31 Am. Rep. 694.

3. **By a Particular Description.**—But while it is a general rule that an article manufactured and sold for a particular purpose is impliedly warranted fit therefor, still when the thing ordered is to be a known, described, and defined article, or when it is to be of a particular design or pattern well defined and understood between the parties, and the article delivered conforms to the pattern, model, or description, there is no warranty that it shall answer the particular purpose intended by the buyer, although the buyer makes known the purpose for which the article is intended: *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496; *Oil Creek Gold Min. Co. v. Fairbanks* (Colo. App.), 74 Pac. 543; *Ricketts v. Sisson*, 9 Dana, 358, 55 Am. Dec. 141; *Dreyfus v. Lour*, 111 La. 22, 35 South. 369; *Rice v. Forsyth*, 41 Md. 389; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Cram v. Gas Engine etc. Co.*, 75 Hun, 316, 26 N. Y. Supp. 1069; *Durbrow etc. Mfg. Co. v. Cuming*, 54 N. Y. Supp. 818, 35 App. Div. 376; *Jarecki Mfg. Co. v. Kerr*, 165 Pa. St. 529, 44 Am. St. Rep. 674, 30 Atl. 1019; *Mason v. Chappell*, 15 Gratt. 572; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 252; *The J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 82 N. W. 229, 49 L. R. A. 859; *Omaha Bottle etc. Co. v. Gunther*, 31 Fed. 208.

"Where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article

so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer": *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. Rep. 46, 35 L. ed. 837, per Justice Fuller.

IV. Sale of Articles for a Specific Purpose.

a. In General.—It is a general rule that on a sale of property which is present and open to inspection, there is no implied warranty of its fitness for any particular use: *Perry v. Johnston*, 59 Ala. 648; *Horwich v. Western Brewery Co.*, 95 Ill. App. 162; *Deming v. Foster*, 42 N. H. 165. But where one contracts to supply an article in which he deals to be applied to a particular purpose of which he is informed, under such circumstances that the buyer necessarily trusts to the judgment of the seller, there is a warranty implied that the article shall be reasonably fit for the purpose to which it is to be applied: *McCaa v. Elam Drug Co.*, 114 Ala. 74, 62 Am. St. Rep. 88, 21 South. 479; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; *Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. 557; *Alpha Check-rower v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Miller v. Gaither*, 66 Ky. (3 Bush) 152; *Fee v. Sentell*, 52 La. Ann. 1957, 28 South. 279; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Little v. Van Sycle*, 115 Mich. 480, 73 N. W. 554; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *St. Louis Brewing Co. v. McEnroe*, 80 Mo. App. 429; *New Birdsall Co. v. Keys*, 99 Mo. App. 458, 74 S. W. 12; *Omaha Coal etc. Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Overton v. Phelan*, 39 Tenn. (2 Head) 445; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737.

But when a known, described and defined article is ordered, although it is stated to be required by the purchaser for a particular purpose, still, if such article is actually supplied, there is no implied warranty that it shall answer the purpose intended by the buyer. In such a case the buyer takes upon himself the risk of the article effecting its purpose: *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547, 5 Atl. 253; *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Gregg v. Page Belting Co.*, 69 N. H. 247, 46 Atl. 26; *Dounce v. Dow*, 64 N. Y. 411; *Cafre v. Lockwood*, 47 N. Y. Supp. 916, 22 App. Div. 11; *Bixler v. Saylor*, 68 Pa. St. 149. See, too, *Berthold v. Seevers Mfg. Co.*, 89 Iowa, 506, 56 N. W. 669.

And where a purchaser himself selects a specific article to apply to a particular use, the warranty will not ordinarily be implied

that it will answer the purpose for which purchased: *Walker v. Pue*, 57 Md. 155; *Badger v. Pippey*, 12 N. Y. St. Rep. 648. And the same seems to be true where he specifies the material to be used in making the article: See *Shoenberger v. McEwen*, 15 Ill. App. 496; *Cunningham v. Hall*, 86 Mass. (4 Allen) 268. In such cases his reliance is on his own judgment rather than on that of the vendor.

If it does not appear that the vendor of a commodity is aware of the particular use for which the vendee buys it, it seems clear that there can be no implied warranty of fitness for that specific use; See *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96. Moreover, it is said that no warranty of fitness of an article for a specific purpose can be implied from a knowledge on the part of the vendor that the article is intended for that purpose: *Bartlett v. Hoppock*, 34 N. H. 118, 88 Am. Dec. 428. See, too, *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150. In this last case the property consisted of logs, and they were bought to manufacture into lumber.

The vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him which have been produced through the unskillfulness of some previous manufacturer or owner, without his knowledge or fault, except in those cases where the sale of the article by him is, in and of itself, legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as is the case of the sale of provisions for domestic use: *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221, 60 N. W. 472; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102.

b. Machinery.—The foregoing principles find frequent application in the case of machinery; and it is uniformly held that where machinery is ordered from a dealer or manufacturer for a special use communicated to him at the time, the law implies a warranty that it is reasonably suitable and fit for the purpose for which it is made and sold, and will perform the work for which it is designed: *Kennebrew v. Southern etc. Machine Co.*, 106 Ala. 377, 17 South. 545; *Hallock v. Cutler*, 71 Ill. App. 471; *Parsons Band Cutter etc. Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580; *Creasy v. Gray*, 88 Mo. App. 454; *Skinner v. Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Wood Mower & Reaper Co. v. Thayer*, 50 Hun, 516, 3 N. Y. Supp. 465; *Southern Brass etc. Co. v. Exeter Mach. Works*, 109 Tenn. 67, 70 S. W. 614. On the sale of a windmill, there is a warranty by implication that it will work well in the place where it is intended to be used: *McClamrock v. Flint*, 101 Ind. 278. Compare *Sellers v. Stevenson*, 163 Pa. St. 262, 29 Atl. 715. And an engine is ordinarily warranted, by implication, to answer the purposes for which it is sold: *Lans v. Wachs*, 50 Ill. App. 262; *Rose v. Meeks*, 91 Iowa, 715, 59 N. W. 30. It is said, however, that no such warranty arises on the sale

of a second-hand boiler: *Ramming v. Caldwell*, 43 Ill. App. 175. See, too, *Norris v. Reinstedler*, 90 Mo. App. 626. Where an engine and boiler of a specified make, size, and power is furnished and set up in a mill, there is no implied warranty that it will furnish power enough to operate the mill: *Wheaton Roller Mill Co. v. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854. And where a definite and known kind of boiler is contracted for, the law raises no warranty that it will operate successfully with the muddy water of the Missouri, although the seller is aware that the use of such water is contemplated: *Grand Avenue Hotel Co. v. Wharton*, 79 Fed. 48, 24 C. C. A. 441.

c. **Brick and Stone.**—An executory sale, by a manufacturer, of a specific article of a well-recognized kind or description in the market, as a good quality of bricks of the grade known as "common," carries an implied warranty that the goods shall conform to the description, be of good material, and well made according to the description, but none that they shall answer the purpose for which they are purchased. As to this the rule of caveat emptor applies: *Wisconsin Red Pressed Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165; 60 Minn. 401, 51 Am. St. Rep. 539, 62 N. W. 550; 67 Minn. 329, 64 Am. St. Rep. 418, 69 N. W. 1091. Compare *Bushman v. Taylor*, 3 Ind. App. 12, 50 Am. St. Rep. 228, 28 N. E. 97; and see *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96. In this last case it is held that where paving stones are supplied according to the dimensions set forth in specifications furnished, there is no warranty implied that they will answer the demands of a particular work.

d. **Commercial Fertilizers.**—On the sale of a commercial fertilizer by one who did not manufacture it, there seems to be no implied warranty that it is reasonably well adapted to the purpose for which it is purchased: *Farrow v. Andrews*, 69 Ala. 96. A contrary rule, however, prevails in Georgia: *Radcliff v. Gunby*, 46 Ga. 464; *Boit v. Williams*, 47 Ga. 620; *Sims v. Howell*, 49 Ga. 620; *Gammell v. Gunby*, 52 Ga. 504; *Barry v. Usry*, 70 Ga. 711. And where a known and specific kind of fertilizer is ordered, even from a manufacturer of the article, although it is stated by the purchaser to be required for a particular purpose, still if the article called for is furnished, there seems to be no warranty implied that it shall answer the particular purpose intended by the buyer: *Rasin v. Conley*, 58 Md. 59; *Mason v. Chappell*, 15 Gratt. 572. Under an agreement to sell a certain brand of fertilizer, the seller is said to warrant the fertilizer to contain the particular ingredients of that brand, but there is no warranty implied that it will produce good results: *Ober v. Blalock*, 40 S. C. 31, 18 S. E. 264.

a. Horses and Cattle.

1. **In General.**—On the sale or exchange of a horse, there is ordinarily no warranty of soundness implied: *Matlock v. Meyers*, 64 Mo. 531; *Gibson v. Hamell*, Tapp. 79. The seller only warrants that it is of the description it appears to be, and nothing more: *Wood v. Ross* (Tex. Civ. App.), 26 S. W. 148. Although it is held that where a lot of mules, some of which are infected with a contagious disease which they communicate to the others without the fault of the purchaser, and the disease is such as to render the stock worthless, such a defect is covered by an implied warranty: *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110. And when a flock or drove of animals are sold, a warranty may be implied that they have not been picked or culled for the purpose of deception: *Colcock v. Goode*, 3 McCord, 513. A patent defect in an animal is not covered by an implied warranty: *Ragsdale v. Shipp*, 108 Ga. 817, 34 S. E. 167. Yet a person is liable for selling a blind horse at a sound price, without declaring his blindness, if it is such as not to be discoverable at first view: *Hughes v. Robertson*, 1 T. B. Mon. 215, 15 Am. Dec. 104. There is no implied warranty of good character on the sale of a steer: *McCurdy v. McFarland*, 10 Mo. 377. See, too, *Deming v. Foster*, 42 N. H. 165; *Smith v. McCall*, 1 McCord, 220, 10 Am. Dec. 666.

2. **For Breeding Purposes.**—A mare is not impliedly warranted fit for breeding when the seller does not know that the buyer intends her for that purpose, and the buyer has an opportunity for inspection, and relies on his own judgment: *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678. And it is decided in *Scott v. Renick*, 40 Ky. (1 B. Mon.) 63, 55 Am. Dec. 177, that the law implies no warranty in the sale of a cow that she will prove suitable for breeding purposes, although the price paid indicates that it is the purpose for which she is purchased.

There is an implied warranty in the sale of a stallion for breeding purposes, when the sale is made by one who raises horses of that kind, deals in them, and therefore knows their qualities, that he shall be reasonably fit for breeding purposes: *Merchants' etc. Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378. But where the contract for the sale of a stallion states that he is "in a bad fix," there is no warranty implied as to his procreative powers: *Wood v. Ross* (Tex. Civ. App.), 26 S. W. 148. And where both parties to the sale of a bull are alike destitute of knowledge or of the means of forming an intelligent judgment as to whether he is able to generate his kind, a warranty against impotence is not implied merely because a full price is paid for him for breeding purposes, and the seller is aware that he is being purchased for that purpose: *McQuaid v. Ross*, 85 Wis. 492, 39 Am. St. Rep. 864, 55 N. W. 705, 22 L. B. A. 187. See, too, *White v. Stelloh*, 74 Wis. 435, 43 N. W. 99.

f. **Seeds and Plants.**—On a sale of seeds for planting, where the vendee relies upon the representations of the vendor and has no opportunity of inspection, there is an implied warranty that the seeds are reasonably fit for the purpose for which they are purchased. The law raises a warranty that they are true to name and answer the description under which the vendor sells them, that they are reasonably free from impurities and foreign seeds, and that they will germinate. In other words, they are warranted free from any defects arising from improper or negligent cultivation and handling: *Gachet v. Warren*, 72 Ala. 288; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; *Shatto v. Abernethy*, 35 Minn. 538, 29 N. W. 325; *Johnson v. Sproull*, 50 Mo. App. 121; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 156; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Prentice v. Fargo*, 65 N. Y. Supp. 1114, 53 App. Div. 608, affirmed in 173 N. Y. 593, 65 N. E. 1121; *Landreth v. Wyckoff*, 73 N. Y. Supp. 388, 67 App. Div. 145; *Bell v. Mills*, 80 N. Y. Supp. 34, 78 App. Div. 42; *Gubner v. Vick*, 6 N. Y. St. Rep. 4. On a sale of onion sets to a merchant by description, there is a warranty implied that they will answer the description and be merchantable: *Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54, 32 South. 494. See, too, *Edgar v. Breck*, 172 Mass. 581, 52 N. E. 1083.

But it seems that where the purchaser of seeds neglects to examine them when an examination would disclose their unfitness, or where he relies on his own judgment and past experience in making the purchase, there is no warranty of fitness implied: *Gardner v. Winter*, 25 Ky. Law Rep. 1472, 78 S. W. 143, 63 L. R. A. 647; *Bell v. Mills*, 74 N. Y. Supp. 224, 68 App. Div. 531. In *Lord v. Graw*, 39 Pa. St. 88, 80 Am. Dec. 504, where the subject of a sale is seed wheat, it is held that the vendor does not warrant the wheat sold to be of the species or kind contemplated by the parties, when the sale is on inspection and the buyer's knowledge is equal to the seller's.

g. Provisions and Drugs.

1. **Articles of Food.**—Where a sale of articles of food is made by a dealer in provisions for direct consumption, the law implies a warranty of soundness and wholesomeness: *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210. All of the authorities seem to agree on this proposition, but whether the rule extends beyond the case of a dealer who sells directly to the consumer for domestic use is not so clear. In *Giroux v. Stodman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, it is held that a warranty that hogs are fit for food is not implied where farmers, who are not dealers in provisions, kill hogs and sell them, knowing the purchasers intend them for their domestic use. It is doubtful, however, if this decision can be reconciled with *Hoover v. Peters*, 18 Mich. 51; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. 116;

Burch v. Spencer, 15 Hun, 504. According to *Sinclair v. Hathaway*, 57 Mich 60, 58 Am. Rep. 327, 23 N. W. 459, a baker impliedly warrants the wholesomeness of bread which he sells at a discount to a peddler who distributes it.

If provisions are sold as merchandise to be resold by the buyer, there is said to be no implied warranty that they are fit for food: *Jones v. Murray*, 19 Ky. (3 T. B. Mon.) 83; *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Ryder v. Neitge*, 21 Minn. 70; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Binschler v. Jelliffe*, 9 Daly, 469. Upon the sale of a live animal to a retail butcher, it has been decided that there is no implied warranty that it is fit for food, although the vendor knows that the butcher buys the animal to slaughter, cut up into meat and sell to customers for their immediate consumption: *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Hanson v. Hartse*, 70 Minn. 282, 68 Am. St. Rep. 527, 73 N. W. 163; *Cotton v. Reed*, 54 N. Y. Supp. 143, 25 Misc. Rep. 380; *Needham v. Dial*, 4 Tex. Civ. App. 141, 23 S. W. 240; *Warren v. Buck*, 71 Vt. 44, 76 Am. St. Rep. 754, 42 Atl. 979. Speaking of this class of cases, Justice Parker, in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372, observes: "It was determined, in *Divine v. McCormick*, 50 Barb. 116, that in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of caveat emptor shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his consumers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case it is fresh meat intended for immediate consumption."

Absence of an opportunity on the part of the buyer for inspection has a most important bearing on this question. Thus, on a sale of hogs, known by the seller to be intended for the market, with no opportunity for inspection, there is an implied warranty of fitness: *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570, 5 Atl. 192. And where a wholesale dealer sells hams to a butcher, and requires payment before inspection, the goods being ordered from a distance, a warranty is implied that the hams are properly cured and fit for food: *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690. See, too, *Forcheimer v. Stewart*, 65 Iowa, 594, 54 Am. Rep. 30, 22 N. W. 886. Compare *Ryan v. Ulmer*, 108 Pa. St. 332, 56 Am. Rep. 210; *Ulmer v. Ryan*, 137 Pa. St. 309, 20 Atl. 705. In *J. S. Farren & Co. v. Dameron* (Md.), 58 Atl. 367, it is held dealer in oysters is not liable on an implied warranty for latent defects developing after a buyer accepts them and ships them to his patrons.

Where canned goods are sold to a consumer by one who did not put them up, it has been held that the law does not imply a warranty that they are wholesome or fit for food: *Julian v. Laubemberger*, 38 N. Y. Supp. 1052, 16 Misc. Rep. 646.

2. **Feed for Horses and Cattle.**—It has been thought that the doctrine of implied warranty of wholesomeness in the case of food articles sold for immediate domestic use does not extend to sale of feed for cattle and other livestock: *Lukens v. Freund*, 27 Kan. 664, 51 Am. Rep. 429. See, also, *Union Oil Mill Co. v. Kennedy*, 105 La. 738, 30 South. 111. Yet in *Coyle v. Baum*, 3 Okla. 695, 41 Pac. 389, it is held that when a feed dealer sells oats to a liveryman, knowing they are intended to feed the buyer's horses, and the buyer does not examine them, there is an implied warranty that the oats are reasonably fit for the purpose for which intended, so that the vendor is liable if they contain castor beans. As to the measure of damages for selling unsound cotton seed for cattle feed which proves injurious to the animals, see *Houston Cotton Oil Co. v. Trammell* (Tex.), 74 S. W. 899.

3. **On the Sale of Drugs by a druggist**, there is an implied warranty that he will deliver the drug called for and purchased. It would be illogical and unjust to apply the rule of caveat emptor to such a case, for the average person would be at a loss to distinguish one drug from another in perhaps most instances, if he should make an examination, while the druggist holds himself out as one skilled in his calling, and may well be held to an implied warranty that he sells what the purchaser asks for: *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280.

JENKINS v. ONTARIO.

[44 Or. 72, 74 Pac. 466.]

REPLEVIN Lies Only Against the Person in Possession of the property; it is a mere possessory action. (p. 627.)

REPLEVIN for a Dog Impounded by a City Marshal and in his possession must be brought against him and not against the municipality. (p. 627.)

Will R. King, for the appellant.

Soliss & Bryant, for the respondent.

⁷³ **BEAN, J.** This is an action against a municipal corporation to recover possession of an animal alleged to have been wrongfully and unlawfully seized and impounded by its

marshal under the authority of an ordinance regulating the running at large of animals within the corporate limits of the city. The complaint, after averring the incorporation of the defendant, the election and appointment of the marshal, the plaintiff's ownership and right to the immediate possession of the property in controversy, and its seizure by the marshal under the ordinance mentioned, alleges that before the commencement of the action "the plaintiff demanded the possession of said animal from defendant, by then and there demanding possession thereof from its marshal, who held possession thereof at said time," and who "still unlawfully holds and detains" the possession thereof from the plaintiff. A demurrer to the complaint was sustained on the ground that the action should have ⁷⁴ been brought against the marshal, and not the municipality, and in this view we concur. The action is to recover the possession of certain specific personal property, and should have been brought against the party having the actual possession. Replevin is a mere possessory action, and Mr. Shinn says: "It is a universal principle of the law of replevin that the action will only lie against the party in possession of the property at the time the action is instituted": Shinn on Replevin, sec. 164. Mr. Wells and Mr. Cobbey lay down the same rule: Wells on Replevin, sec. 134; Cobbey on Replevin, sec. 432. And the authorities agree, to adopt the language of Mr. Justice Gary, that replevin lies "only against one from whose possession the sheriff can take the property. and to whose possession it can be returned if a return be awarded": *Richardson v. Cassidy*, 63 Ill. App. 482; *Rose v. Cash*, 58 Ind. 278; *Herzberg v. Sachse*, 60 Md. 426; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613.

It has accordingly been held that the action cannot be maintained against an attaching or judgment creditor for goods attached or seized by an officer under a writ of attachment or execution: *Richardson v. Reed*, 4 Gray, 441, 64 Am. Dec. 77; *House v. Turner*, 106 Mich. 240, 64 N. W. 20. In the former case. Mr. Justice Metcalf, speaking for the court, says: "Though an officer who attaches, and a plaintiff who directs him to attach, A's goods, on a writ against B. are joint trespassers, and may be sued jointly in an action of trespass or trover, yet they cannot be sued jointly in an action of replevin. The grounds and incidents of a replevin suit are incompatible with the joinder of the creditor and officer as defendants. The writ of replevin assumes that the goods which are to be

replevied have been taken, detained, or attached by the defendant, and are in his possession or under his control; and it directs that they shall be replevied and delivered to the plaintiff, provided he shall give bond conditioned, among other ⁷⁸ things, to restore and return the same goods to the defendant, and pay him damages, if such shall be the final judgment in the action." The same principle applies to an action to recover property in the possession of a municipal officer. It must be brought against the party in possession, leaving him, if he so desires, to plead the authority under which he holds it. The complaint in this case shows affirmatively that the property in controversy at the time of the demand and the commencement of the action was in the actual possession of the marshal. It should therefore have been brought against him alone, though in some other form of action the municipality might be liable to the plaintiff for the marshal's acts. It follows that the judgment of the court below must be affirmed, and it is so ordered.

To Sustain Replevin, the defendant must have actual or constructive possession or control of the property in controversy at the commencement of the action, whether he is an officer or a private person: See the monographic note to *Sinnott v. Feiock*, 80 Am. St. Rep. 744. That replevin lies for the recovery of a dog, see the monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 291.

DANIELSON v. ROBERTS.

[44 Or. 108, 74 Pac. 913.]

LOST PROPERTY and Treasure-trove Distinguished.—Lost property is such as is found on the surface of the earth, and with which the owner has involuntarily parted; treasure-trove is money or coin found hidden in the earth or other private place, the owner being unknown. (p. 631.)

FINDER OF BURIED MONEY.—If Workmen find money which has been buried or secreted on the premises occupied by their employer, and he obtains possession of it, they may maintain an action for its recovery, in order that they may make a lawful disposition of it. (p. 632.)

W. E. Phipps and J. A. Jeffrey, for the appellants.

William I. Vawter and James R. Neil, for the respondents.

110 BEAN, J. This is an action of trover to recover for the alleged conversion of money. The plaintiffs aver, in substance, that in March, 1894, while engaged at the request of the defendants in cleaning out and removing the loose dirt and debris from an old building situated on premises occupied by the defendants, they discovered a tin vessel, rusty, and worn with age, which contained the sum of seven thousand dollars in gold coin of the United States; that the defendants wrongfully took and received the money from the plaintiffs, and have ever since wrongfully and unlawfully detained the same, to their damage in the sum of seven thousand dollars; that the building in which the money was found had stood on the premises for more than forty years, and during that time had been in the possession and control of many owners and tenants; that the dirt and debris which the plaintiffs were engaged in cleaning out and removing at the time the money was discovered had been undisturbed for many years; that the vessel which contained the money was so worn and destroyed by time and the elements that it was difficult to ascertain from an inspection of it what kind of a vessel it had been, and plaintiffs could hardly hold it together until it and its contents were taken by the defendants; that the owner of the vessel and the money contained therein "has long since died, and the said vessel and the said sum of seven thousand dollars contained therein were prior to said time lost, and their whereabouts unknown to any person or persons whatever"; that plaintiffs are the discoverers of the money and are now, and ever since the — day of March, 1894, have been the owners thereof, and entitled to its immediate possession; that defendants wrongfully and unlawfully ¹¹¹ fail, neglect and refuse to repay the same to the plaintiffs, etc. The answer denies all the material allegations of the complaint, except the discovery by the plaintiffs of the treasure, and that they were working for the defendants at the time, and alleges affirmatively that the money discovered did not exceed the sum of one thousand dollars, and was the property of one of the defendants, who had voluntarily deposited it in the place where discovered for safekeeping; and at no time had abandoned or lost it. The reply denies the material allegations of the answer. Upon the issues joined the cause came on for trial before a jury. After the plaintiffs' testimony was all in, the defendants moved for and were allowed a nonsuit.

The evidence in the bill of exceptions tends to show that in 1894 the plaintiffs, who were then aged about eight and ten

years, respectively, were employed by the defendants to clean out an old henhouse, situated on premises then occupied by defendants, but which had previously been owned and in the possession of numerous other persons; that while so engaged they dug up an old rust-eaten half-gallon tin can containing a number of musty and partially decayed tobacco sacks filled with gold coin, which they delivered to the defendants. W. O. Danielson, the elder of the two boys, thus describes the finding of the money and its delivery to the defendants: "We hauled several loads from the front end of the building. I was in the back end of the building, spading through the trash, and the point of the shovel struck something hard. I shoveled the trash away, and got the can on my spade, and was going to throw it in the sled. It was too heavy, so I dragged it out toward me a foot or so, and told my brother the can must be full of rocks. So I tried to take the lid off with my fingers. It was rusty and old, and I could not get it off, so I took the pick and chopped through the lid, and when I pulled it out the lid came with it. . . . ¹¹² In doing so I cut two of the sacks—tobacco sacks—containing fives and twenties. So we looked through all the sacks, which were gold. . . . My brother says, 'Let's take it over home.' I says, 'No, . . . let's take it up and show Dee Roberts.' So we packed it up on the spade together. . . . We packed it up to the porch steps, and Dee came out, and says, 'What you got, boys?' We says, 'A can of gold.' 'Where did you get it?' 'Out in the henhouse.' So Mary Roberts, Dee's wife, and O'Neil came to the door, and said, 'Let's have it'; so we gave it to them. They walked inside and closed the door in our face and we went back to work to finish up our job. About half an hour after, Dee called us out and says: 'Here's five cents, boys. We put the money there some time ago, and were going to buy something with it. Don't say anything about it, and the Lord will bless you.' We asked him how much was in the can. He said, 'Over seven thousand dollars.'" The witness further testified that the can containing the money was old and rusty, and almost ready to fall to pieces; that it was buried in the earth under the debris and dirt in the henhouse, three or four inches below the surface, and that the ground around it was quite solid, as if it had not been disturbed recently; that the building in which it was found was old, and looked as if it had not been cleaned out for some time, and the dirt and debris over the can did not appear to have been

recently disturbed. The plaintiff, C. P. Danielson, testified to substantially the same state of facts.

The motion for nonsuit was sustained on the ground, as we understand it, that the evidence for the plaintiffs showed that the money in question had been intentionally deposited by some one where found, and therefore the plaintiffs could not invoke the rule that the finder of lost property is entitled to its possession against all the world except its true owner. Ever since the early ¹¹³ case of *Armory v. Delamirie*, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled: *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; 19 Am. & Eng. Ency. of Law, 2 ed., 579. But it is argued that property is lost in the legal sense of that word only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safekeeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to any one the place of deposit. This seems to have been the view taken by Mr. Justice Lord in *Sovern v. Yoran*, where money was found hidden under the floor of a barn. It had evidently, as in this case, been deposited there by some one, and the question for decision was whether the defendant, who had treated the money as lost property, and disposed of it as provided in the statute, was guilty of a conversion, and liable to the true owner therefor. It is said in the opinion that until the owner was discovered, the money was in the nature of treasure-trove, and could not be treated as lost property, within the meaning of the statute. At common law a distinction was made between lost property and treasure-trove. Lost property was such as was found on the surface ¹¹⁴ of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his

property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker until the owner appeared and showed that its losing was accidental, or without an intention to abandon the property. Treasure-trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place, the owner being unknown. It originally belonged to the finder if the owner was not discovered; but Blackstone says it was afterward judged expedient, for the purposes of state, and particularly for the coinage, that it should go to the king; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to that king: Blackstone's Commentaries, *295.

In this country the law relating to treasure-trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure-trove obtains in any state has never been decided in America: 2 Kent's Commentaries, *357; 26 Am. & Eng. Ency. of Law, 1st ed., 538. But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or if treasure-trove, whether it belongs to the state or to the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface. It is thus stated in *Armory v. Delamirie*, 1 Smith's ¹¹⁵ Lead. Cas., pt. 1, *475: "Everyone on whom the possession of chattels personal is cast by the law, by the act of the parties, or through the force of circumstances is charged with the duty of taking reasonable care, and answerable if he does not to the owner, and may consequently recover for any wrongful act by which the property is impaired, in the capacity of trustee, if in no other character." The money for which this action is brought came lawfully into the possession of the plaintiffs. The circumstances under which it was discovered, the condition of the vessel in which it was contained, and the place of deposit, as shown by the plaintiff's testimony, all tend with more or less force to indicate that it had been buried for some considerable time, and that the owner

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was probably dead or unknown. The plaintiffs, having thus come into its possession, were charged with the duty of holding it for the true owner, if he could be ascertained, and, if not, of making such disposition thereof as the law required. The possession of the money was cast upon them by the force of circumstances. They were consequently under the obligation of taking reasonable care of it until it could be returned to the true owner or otherwise disposed of, and they may therefore maintain such actions or proceedings as may be necessary to enable them to retain or recover its possession. The fact that the money was found on the premises of the defendants, or that the plaintiffs were in their service at the time, can in no way affect the plaintiffs' right to possession, or their duty in reference to the lost treasure: *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 Am. Rep. 664; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Tatum v. Sharpless*, 6 Phila. 18; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75. We are of the opinion, therefore, that the case should have gone to the jury, and, unless it should appear that the defendants are the owners of the money, they ¹¹⁶ must return the possession thereof to the plaintiffs, in order that they may make lawful disposition thereof. Judgment reversed and new trial ordered.

The Finder of a Lost Article is entitled to its possession as against all other persons, excepting the true owner: *Hoagland v. Forest Park etc. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740. As to whether this rule applies to property which has been hidden or secreted for safekeeping, see *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293; *Ferguson v. Ray*, 44 Or. 557, post, p. 648. And as to an employé's right to property found in the course of his work on his employer's premises, see *Burns v. Clark*, 133 Cal. 634, 85 Am. St. Rep. 233, and cases cited in the cross-reference note thereto. What is treasure-trove is discussed in *Ferguson v. Ray*, 44 Or. 557, post, p. 648. And larceny of lost property is discussed in the note to *People v. Miller*, 88 Am. St. Rep. 591-594.

PORTLAND v. YICK.

[44 Or. 439, 75 Pac. 706.]

STATUTES—Legislative Journals—Courts Take Judicial Notice of the contents of the journals and other records of legislative bodies, required to be kept by the fundamental law, which may in any manner affect the validity or the meaning and construction of an act. (pp. 636, 637.)

STATUTES—Enactment of—Legislative Journals—Courts will not look behind an enrolled bill having the signatures of the presiding officers of the two Houses and filed in the office of the Secretary of State, except to determine whether it appears affirmatively from the records of those bodies that the mandatory provisions of the constitution have not been observed in the enactment; and, unless it does so appear, the law will not be declared invalid. (p. 637.)

ORDINANCES and Municipal Journals—Judicial Notice.—Municipal courts, and circuit courts, on a trial de novo on appeal, will take judicial notice of the ordinances of the municipality, and of such journals and records of the law-making body as affect their validity, meaning and construction. (p. 637.)

ORDINANCES—Adoption of—Impeachment by Courts.—If a municipal ordinance is to be impeached or overthrown because irregularly adopted, it must appear affirmatively from the journals of the common council that the mandatory provisions of the city charter relative to the passage of the ordinance have not been observed; and mere silence of the records does not amount to such a showing. (pp. 637, 638.)

ORDINANCES—Adoption of—Records of Council.—When the regularity of the passage of a city ordinance is questioned, courts will not look into minor records which the council may require kept, to determine whether the rules which it has adopted for the orderly dispatch of business have been complied with. (p. 638.)

ORDINANCES—Regularity of Adoption.—A Method adopted by a city council of keeping a record of the suspension of rules and the passage of an ordinance, by attaching to the ordinance slips containing the yeas and nays, will not be questioned by the courts. (p. 638.)

MUNICIPAL CORPORATION'S Power to Suppress Lotteries. The power delegated to a city "to prevent and suppress gaming and gambling-houses, or places where any game in which chance predominates is played for anything of value," authorizes the common council to prevent the setting up or keeping of any house or place for the purpose of selling lottery tickets or certificates depending upon the event of a lottery. (p. 638.)

IF A PENALTY is Prescribed by an Ordinance for the doing of an act, this is notice of the unlawful character of the act, although it is not expressly declared to be a crime or to be unlawful. (p. 638.)

ORDINANCE.—Neither the Signing nor the Attestation of an ordinance by the city auditor is essential to its validity under the charter of Portland. (p. 639.)

Cicero M. Idleman and Almon C. Palmer, for the appellant.

Lawrence A. McNary, city attorney, Joseph J. Fitzgerald and John P. Cavanaugh, for the respondent.

440 WOLVERTON, J. The defendant was convicted in the municipal court of the city of Portland of the violation of ordinance No. 11,336, and appealed to the circuit court, wherein he was again convicted, and now appeals to this court. He is charged with the violation of section 2 of the ordinance, which provides: "No person or persons shall within the corporate limits of the city of Portland set up or keep, either as owner proprietor, keeper, manager, or employé, with or without hire, lessee or otherwise, any house, shop or place for the purpose of selling any lottery ticket, certificate, paper or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share or interest in or depending upon the event of any lottery."

Section 6 provides for the punishment of any violation **441** of the ordinance by fine or imprisonment, or both. When the city offered evidence at the trial in the circuit court it was met with the objection by the defendant that the ordinance had not been adopted in the manner provided by charter and the rules governing the common council, and was therefore void and inoperative. None of the records of the common council relative to the adoption of the ordinance were introduced in evidence, but the court was asked to take judicial knowledge thereof, and thereby determine the validity of its adoption. Under section 27 of the city charter of 1898 (Laws 1898, pp. 101, 108), the common council was authorized to adopt rules for the government of its members and its proceedings. It was required, however, to keep a journal of its proceedings, and upon the call of any two of its members to cause the yeas and nays to be taken and entered in the journal upon any question before it. In pursuance of this charter regulation, the following among other rules were adopted, viz.:

"Rule 26. No standing rule as provided by this ordinance shall be rescinded or suspended, except by vote of two-thirds of all the members present, and the ayes and nays shall be recorded on any motion to suspend a rule.

"Rule 27. Every ordinance shall receive three readings previous to its being passed, but shall not be read more than twice at any one meeting."

The journal shows that the ordinance was read the first time and second time by title, and, on motion of Councilman Harris,

duly seconded and carried, rule 27 was suspended, the ordinance read a third time by title, placed upon its final passage, and passed by 11 yeas, giving the names of the councilmen voting yea. The ordinance has this attestation at the bottom:

"Passed the council, March 21, 1900.

"A. N. GAMBELL, Auditor.

"Approved, March 22, 1900.

"W. A. STOREY, Mayor."

442 On the back there are attached two slips, each containing the names of the councilmen, with the words, "Yeas," "Nays," at the top in separate columns. One of them bears at the top the notation in pencil, "Suspension Rule 27," and opposite each name in the column headed "Yeas" a perpendicular pencil mark. The other bears at the top the word "Passage," with a like mark opposite each name in the column headed "Yeas," thus indicating that rule 27 was suspended by a unanimous vote, and the ordinance passed by a like vote, the latter showing the vote to be the same as recorded in the journal.

1. Preliminarily, it is urged that the courts will not take judicial knowledge of the acts of the common council leading to the adoption of an ordinance, but only of the text or provisions of the ordinance. It will be noted that the charter regulations relating to the keeping of a journal by the common council are almost identical with the requirements of the state constitution for the government of each house of the legislative assembly. This court said in *State v. Rogers*, 22 Or. 348, 364, 30 Pac. 74. Mr. Justice Bean announcing the opinion: "In *Currie v. Southern Pac. Co.*, 21 Or. 566, 28 Pac. 884, we held that the court will take judicial knowledge of the journals of the legislature for the purpose of impeaching the validity of the enrolled act on file with the Secretary of State; and when from such journals it affirmatively appears that the bill as filed in the Secretary of State's office did not in fact pass the legislature, the courts will refuse to recognize it as a valid law; but every reasonable presumption is to be made in favor of the legislative proceedings; and when the constitution does not require certain proceedings to be entered in the journal, the absence of such a record will not invalidate a law. It will not be presumed, from the mere silence of the journal, that either House has exceeded its authority or disregarded constitutional requirements.⁴⁴³ in the passage of legislative acts." The bill

which was the subject of the controversy in that case passed the House and was amended in the Senate. When returned to the House that body concurred in the amendments. This was shown by the journal, but it did not show that the bill as amended was read section by section on the final passage, nor that the vote was taken by yeas and nays, as required by article 4, section 19, of the constitution. Conceding that the yeas and nays should have been thus taken in that instance, the court further say: "We must assume, in the absence of showing to the contrary, that the constitutional requirements were observed, and hold that the act under consideration was constitutionally passed." In the Currie case, alluded to in the opinion of the court in *State v. Rogers*, 22 Or. 348, 30 Pac. 74, the bill went to the Senate after passing the House, and the journal shows that it was put upon its final passage, when it received thirteen yeas and eleven nays. There were five absent and one senator was excused; "so," continues the record, "the bill failed to pass." There was an affirmative showing that the bill failed to pass, and the court took judicial cognizance of the record in the journal, and declared the act inoperative.

The same principle was announced in *McKinnon v. Cotner*, 30 Or. 588, 591, 49 Pac. 956. The bill in that instance passed the House, went to the Senate, and was amended by the addition of section 8, being an emergency clause, and passed, when it was returned to the House and the amendment concurred in. This is all shown by the journals of the two Houses, but no other reference is made therein to the bill, except to show that it was duly signed by the presiding officers. The enrolled act so signed was approved by the governor, filed in the office of the Secretary of State, and published among the general laws, but it did not contain section 8, and the act was held valid because it nowhere appeared in the journals that the act did not pass⁴⁴⁴ in the form actually signed by the presiding officer and as found on file in the office of the Secretary of State. In all these cases, if we are rightly informed, the court took judicial knowledge of the state of the record as shown by the journals in the two Houses, without the necessity of their introduction in evidence. Indeed, the general rule seems to be that courts will take judicial notice of the contents of the journals and other records of legislative bodies, required to be kept by the fundamental law, which may in any manner affect the validity or the meaning and proper construction of an act. But further than this they will not go, and they will not take judicial cog-

nizance of any fact that is without legal potency to affect the validity of the act or to explain its meaning or construction: 17 Am. & Eng. Ency. of Law, 2d ed., 928, 929; Division of Howard County, 15 Kan. 194; People v. Mahaney, 13 Mich. 481; Green v. Weller, 32 Miss. 630; Somers v. State, 3 S. Dak. 321, 58 N. W. 804; Ritchie v. Richards, 14 Utah, 345, 47 Pac. 670; McDonald v. State, 80 Wis. 407, 50 N. W. 185. Under the doctrine of this court it will not look behind the enrolled bill having the signatures of the presiding officers of the two Houses and filed in the office of the Secretary of State, except to determine whether it appears affirmatively from the records of those bodies that the mandatory provisions of the constitution have not been observed in the enactment; and, unless it does so appear, the law will not be declared invalid. Mere silence of the journals as to such a requirement will not suffice to overthrow it, unless it might be in a case where the constitution requires an entry in the journal, as the presumption will then obtain that the legislature proceeded regularly and properly. Such being the ascertained rule and doctrine, the further solution of the present problem is not difficult.

2. The municipal courts will take judicial notice of the ⁴⁴⁵ ordinances of the municipality and of such journals and records of the law-making body as affect their validity, meaning and construction in like manner and for like purposes as the courts of the state take judicial cognizance of the public statutes of the state, and, in the event of an appeal to the circuit court, although by the rules of law the case is to be tried de novo, the circuit court will take like judicial notice of such ordinances as the municipal courts. We are not saying that it will not do so upon any other principle, but it will upon this, which suffices for the determination of the present controversy: City of Solomon v. Hughes, 24 Kan. 211; Downing v. City of Miltonvale, 36 Kan. 740, 14 Pac. 281; State v. Leiber, 11 Iowa, 407; Town of Laporte City v. Goodfellow, 47 Iowa, 572; Town of Moundsville v. Velton, 35 W. Va. 217, 13 S. E. 373.

3. The charter as to the common council stands in the same relation that the constitution does to the two Houses of the legislative assembly, and, if the ordinance in question is to be impeached or overthrown, it must appear affirmatively from the journal of the common council that the mandatory provisions of the fundamental law relative to the passage of the ordinance have not been observed. The courts will not look into minor records that the council may require to be kept to determine

whether the rules which it has adopted for the orderly dispatch of the business before it have been complied with, and whenever it is not affirmatively shown by the journal (mere silence of the record not amounting to such a showing) that the charter provisions relative to the adoption of the ordinance have not been complied with, the ordinance in controversy must be deemed to have been regularly adopted. Now, the ordinance under consideration appears affirmatively from the journal to have received a majority vote of all the members of the common council. This was sufficient to indicate its adoption: *Laws 1898*, pp. 101, 109, sec. 30.

⁴⁴⁶ 4. The record as to the suspension of the rules is not required by the charter to be kept in the journal, and, if it were at all material to the present controversy, the record of the yeas and nays on the suspension of the rules kept by the common council upon slips attached to the ordinance is amply sufficient to show a compliance with the rules. It was the method employed by the common council for keeping the record, and, being by it deemed sufficient for the purpose, the courts will not intervene to hold it void.

5. It is next contended that the common council was not empowered to adopt the ordinance. The delegated power is "to prevent and suppress gaming and gambling-houses, or places where any game in which chance predominates is played for anything of value." This is unquestionably broad enough to authorize the common council to prevent the setting up or keeping of any house or place for the purpose of selling lottery tickets or certificates depending upon the event of a lottery, which is essentially the purpose of section 2 of the ordinance in question. The setting up or keeping of such a house is in itself an overt act, and constitutes the offense, the object of the charter being to prevent and suppress gambling-houses. Lottery, it has been held, is a gaming device (*Ex parte Kameta*, 36 Or 251, 78 Am. St. Rep. 775, 60 Pac. 394), and the keeping of a house for the purpose of selling lottery tickets is as much within the spirit and intendment of the charter as if it was kept for any other kind of gambling.

6. Another objection urged to the ordinance is that the acts prohibited thereby are not declared to be crimes or misdemeanors, or even to be unlawful. A penalty, however, is prescribed for their violation, and this is all that is necessary to notify persons of the unlawful character of the offense.

7. The next and last objection preferred is that the auditor ⁴⁴⁷ did not attest the ordinance as "Auditor of the City of Portland," as he is styled in the charter: Laws 1898, pp. 101, 119, sec. 46. Manifestly, the answer to this is that neither the signing nor the attestation of the ordinance by the auditor is essential to its validity under the charter. It might be, and no doubt is, convenient, and perhaps essential, to identify the ordinance in its transmission to the mayor and return to the council body that he attest it, or place upon it his file-mark; but we are not aware that any such formality is required in order to complete its perfect enactment, so as to give it the force of law.

These considerations affirm the judgment of the trial court, and such will be the order of this court.

As to How Far Courts will go into the examination of the journals and records of legislative bodies to determine whether a statute has been regularly and legally enacted, see the monographic note to *Carr v. Coke*, 47 Am. St. Rep. 814-823, and the subsequent cases of *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 85 Am. St. Rep. 42; *County of Yolo v. Coglan*, 132 Cal. 265, 84 Am. St. Rep. 41; *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889.

Courts Take Judicial Notice of municipal charters: *Arndt v. Cullman*, 152 Ala. 540, 90 Am. St. Rep. 922. But it seems that only the municipal courts will take judicial notice of city ordinances: See the monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 668. Consult, also, *City Council v. O'Donnell*, 29 S. C. 355, 13 Am. St. Rep. 728; *Western etc. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320. Although where an appeal is taken from a municipal court to the district court, the latter, on a trial de novo, will take judicial notice of an ordinance involved in the case: See the note to *Lanfear v. Mestier*, 89 Am. Dec. 669; *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 573.

BRETT v. WARNICK.

[44 Or. 511, 75 Pac. 1061.]

BENEFIT SOCIETY—Suit to Recover Insurance Certificate.—

Where it is agreed between a member of a benefit society, his beneficiary, and a third person that the latter shall have the insurance certificate and all rights thereunder, a suit by him, after the performance of the contract on his part and the death of the assured, to recover the certificate from the beneficiary and the insurance money from the society, is properly brought in equity. (p. 642.)

BENEFIT SOCIETY—Substitution of Beneficiaries.—Where it is agreed between a member of a benefit society, his beneficiary,

and a third person that the latter shall receive the insurance money, his lack of substitution as beneficiary in the manner provided in the constitution and by-laws of the society does not affect the agreement nor deprive him of his equity, when the society does not insist upon it and has paid the fund into court. (p. 642.)

BENEFIT SOCIETY—Transfer of Beneficiary's Interest.—A member of a benefit society may, with the assent of the beneficiary, make a contract with a third person whereby the latter obtains a vested interest in the fund designated in the certificate, provided the contract is not opposed to public policy. (p. 643.)

BENEFIT SOCIETY—Assignment of Certificate.—A cousin of a member of a benefit society, while he has not sufficient blood relationship to have an insurable interest in the life of the assured, may take an assignment of the benefit certificate, the rules of the society not inhibiting it and the beneficiaries consenting, as security for advances made on the faith of the agreement, if the transaction is conceived in good faith, and not to avoid the inhibition of the law against wagering contracts. (p. 647.)

Danson & Huneke and James R. Stoddard, for the appellant.

William Reid, for the respondents.

512 WOLVERTON, J. This is an action by George R. Brett against Robert Z. and John W. Warnick and the Grand Lodge of the Ancient Order of United Workmen of Oregon to compel the delivery to plaintiff of a benefit certificate by the defendants Warnick, and to recover of the defendant lodge the sum named therein. In 1880 the Grand Lodge of the Ancient Order of United Workmen of Oregon issued to J. F. Warnick a certificate entitling him to participate in the beneficiary fund of the order to the amount of two thousand dollars, payable at his death to his wife. On May 10, 1898, his wife having died prior thereto, Warnick procured the issuance of a new certificate substituting the defendants R. Z. Warnick and J. W. Warnick, his brothers, as the beneficiaries. Plaintiff alleges that the substitution was procured on the part of J. F. Warnick, in consideration that the beneficiaries would thenceforth pay the dues and assessments accruing to the order, and would provide him with a home during the remainder of his life; that the beneficiaries accordingly paid such dues and assessments, and provided him with a home until October, 1900, when it was mutually agreed by and between the plaintiff, the assured, and the beneficiaries that the plaintiff, who was a cousin of the Warnicks, should henceforth provide the assured with a home, pay his dues **513** and assessments to the order, and at his death pay his funeral expenses, and, when convenient for him to do so, repay to the beneficiaries the amount of dues and assessments

which they had previously paid to the order, being the sum of ninety dollars; and that in consideration thereof and upon repayment of said sum the defendants Warnick should deliver to plaintiff the beneficiary certificate, and relinquish to him all their right and title thereto, and all benefits to be derived therefrom. Plaintiff further alleges that in pursuance of said agreement he brought the assured to his home, cared and provided for him, and paid all his dues and assessments to the order until his death, which occurred April 13, 1903, and thereafter paid his funeral expenses; that prior to April 7, 1903, plaintiff paid to the defendants Warnick fifty dollars, and on that date tendered to them the balance due, being forty dollars, on condition that they surrender to him the said beneficiary certificate, which they refused to do, and that they now claim that the sum named in the certificate is due from the order to them. Proof of death is shown, and a decree is prayed, requiring defendants Warnick to deliver the certificate to plaintiff, and that he recover from the order the sum named therein.

The answer puts in issue the allegations of the complaint touching the payment of the dues and assessments by the defendants Warnick subsequent to their substitution as beneficiaries and prior to October, 1900, the agreement between plaintiff and the Warnicks, and the performance thereof on the part of the plaintiff, and further alleges the conditions upon which the change of beneficiaries could be had under the constitution and by-laws of the order; that the assured never at any time since the date of the certificate in question changed the beneficiaries; that due proof of the death of the assured was made, and that the claim under the certificate was duly audited to the defendants ⁵¹⁴ Warnick, payable one thousand dollars to each, and that the grand lodge had no notice of the claim of plaintiff until after the death of the assured, or until after the date of the filing of the death report. The defendant order answered that it had no beneficial interest in the fund, paid the same into court, and asked a discharge, and was, by order of the court, accordingly released. The contention being thus left to proceed between the plaintiff and the defendants Warnick, the latter moved for a decree upon the pleadings dismissing the complaint at the cost of the plaintiff, which motion was allowed, and a decree given and rendered accordingly, from which plaintiff appeals.

The case was submitted on briefs under the proviso of rule 16.

⁵¹⁷ Two questions are presented: 1. Whether the complaint states a cause entitling plaintiffs to equitable relief; and 2. Whether the agreement relied upon for recovery is subject to the objection that it is essentially a wagering contract, and therefore void, as in contravention of public policy.

1. As to the first, we are clear that the real purpose of the complaint is to require a specific performance of the alleged agreement to surrender the certificate upon the completed payment by Brett to the defendants Warnick of the sum of ninety dollars, which it is averred that they had formerly paid of the dues and assessments under an agreement by them with the assured, Brett having fulfilled, as he claims, the other conditions of his agreement in providing a home for the assured and paying his dues and assessments since forming the compact, and at the same time to prevent the order from paying the fund over to the defendants Warnick and to require its payment to the plaintiff. The relief is such that equity alone can adequately grant. An action against the defendants Warnick could not have met the purpose, as they had not as yet received the fund, and a judgment against them might prove unavailing if they were found to be insolvent; so that the remedy at law cannot be considered as adequate as the one adopted for equitable relief. The complaint is therefore not objectionable on the ground that it discloses a want of equity.

2. Nor does the lack of the actual substitution of plaintiff ⁵¹⁸ as beneficiary in the certificate in the stead of the defendants Warnick in the manner provided in the constitution and by-laws of the order for making such a change affect the agreement, and deprive the plaintiff of his equity, seeing that the company does not insist upon it, and has paid the fund into court to be awarded to the contestant entitled to it in the controversy, which is now wholly between the plaintiff and the defendants Warnick: *Pennsylvania R. R. Co. v. Wolfe*, 203 Pa. St. 269, 52 Atl. 247; *Swedish C. M. Soc. v. Lawrence*, 79 Minn. 124, 81 N. W. 756; *Benard v. Grand Lodge*, 13 S. Dak. 132, 82 N. W. 404.

3. It has been held that, where a person becomes a member of a mutual benefit association, under an agreement with the beneficiary named in the certificate that he, the beneficiary, shall pay all the assessments, and they are so paid accordingly, the beneficiary thus acquires a vested interest in the certificate,

so that the member cannot afterward make another designation without the consent of the beneficiary: *Maynard v. Vanderwerker*, 30 Abb. (N. C.) 134, 24 N. Y. Supp. 932. This case, it should be noted, was reversed on appeal. The error, however, related solely to a question of fact, leaving the principle here announced unaffected: *Maynard v. Vanderwerker*, 76 Hun, 25, 27 N. Y. Supp. 714. So, if a member, by valid contract, assumes to dispose of his interest in the beneficial fund of the order, virtually the proceeds of the certificate of insurance, and agrees not to change the beneficiary, in consideration of the payment by the beneficiary of all dues and assessments against such member, if not in conflict with the lawful conditions upon which the order grants the insurance, it is effectual as against the subsequent attempt of the member to annul it: *Clarke v. Police Ins. Board*, 123 Cal. 24, 55 Pac. 576. The doctrine appeals to us as reasonable and sound, and, being so regarded, there is nothing to hinder the member, with the assent of the beneficiary, from contracting with ⁵¹⁹ a third party, whereby the latter may obtain a vested interest in the fund designated in the certificate, provided that the contract is not such as the law will not recognize because contrary to public policy. Such is the condition here, as shown by the allegations of the complaint. Brett's contract or agreement is not only with the member, but the beneficiaries designated in the certificate, or policy, it may be termed; and, if his allegations are true that he has acquired at least a substantial interest in the fund, if the agreement is otherwise lawful, his remedy in equity is clear. This result does not impinge upon the doctrine announced in the case of *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109. The question there presented was whether a change in the beneficiary had been accomplished aside from any contract or agreement between the parties, and depended upon whether there had been a substantial observance of the regulations in the constitution and by-laws of the order relative to the subject.

4. With relation to the second question presented, the defendants urge that Brett was without an insurable interest in the life of deceased, and hence that the alleged agreement was unlawful, as being contrary to public policy. It is beyond cavil that a person may take out a policy of insurance on his own life, and make it payable to whomsoever he pleases, he being the moving spirit, and assuming the responsibility of meeting the premiums or assessments. It would seem to follow

logically from this that he might also, having effected a valid insurance upon his life, dispose of the policy, or assign it to whomsoever he desires, if the transaction is contrived in good morals, and not as a shift or cover for illegitimate purposes. But before one can be permitted to take out a policy of insurance upon the life of another for the former's benefit he must have an insurable interest in the life of the latter. If he ⁵²⁰ has not such an interest, and procures the policy notwithstanding, the law denominates it a "wagering contract," and, being in contravention of public policy, the holder will not be permitted to profit by his investment. "To have an insurable interest in the life of another," says Mr. May in his valuable work on Insurance, "one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life": 1 May on Insurance, 3d ed., sec. 102a. Speaking upon the same subject, in Warnock v. Davis, 104 U. S. 775, 779, 26 L. ed. 924, Mr. Justice Field says with more elaboration: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and the child in the life of a parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured; otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any ⁵²¹ statute on the subject, condemned, as being against public policy": See, also, Connecticut Mut. L. Ins. Co. v. Schaefer, 94

U. S. 457, 24 L. ed. 251; *Loomis v. Eagle etc. Ins. Co.*, 6 Gray, 396.

The rule seems to be stated generally by a line of authorities that all the objections against taking out a policy of insurance upon the life of another, without an insurable interest in such a life, exist with equal force and potency against the holding of such a policy by mere purchase and assignment to another: *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 318; *Kessler v. Kuhns*, 1 Ind. App. 511, 27 N. E. 980. In the latter case are collated all the principal authorities supporting the doctrine. Undoubtedly, if the policy was procured in the first instance by one without an insurable interest, its assignment to another without such an interest could not help the matter; as both transactions would be alike tainted with illegality. But where the policy is procured by one upon his own life, or by one upon the life of another in which he has an insurable interest, and therefore perfectly legitimate in its origin, another line of authorities holds that it may be assigned to one without such an interest, subject to the condition and restriction that it is not made as a cloak or cover for wagering purposes, or for mere speculation upon the life of the person upon whom the policy has been issued. It is easy to see how a contract, apparently valid in its inception, might be rendered invalid when coupled with a contract of assignment, where the purpose is eventually to procure a policy upon the life of another in whom there exists no insurable interest. For instance, a husband may take out a policy upon the life of his wife, in which, by all the authorities, he has an insurable interest. If now the policy be at once assigned to a third person without an insurable interest in the wife's life, on condition merely that he pay the premium, nothing more, with a view to ⁵²² his obtaining the insurance at the death of the wife, the transaction would be indicative of an intendment to effect insurance contrary to public policy. It would be tantamount to procuring insurance indirectly which the law will not tolerate to be done directly, and the evil would be the same. A like inference would also be deducible where the consideration or insurable interest to support the assignment was merely nominal. It would be apparent that the transaction was intended as a cover only to conceal the real device—that is, to secure insurance upon the life of another without having at the time an insurable interest in such life—which is the vice that the law will not tolerate.

It does not necessarily follow, however, that, where a policy is taken out upon one's life for the benefit of another, and is assigned to a third party, who pays the premium, it stamps the transaction as a wagering device, but it depends upon the good faith of the transaction; that is, whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager: *Bliss on Life Insurance*, 2d ed., sec. 26. "The rule," says Mr. Justice Earl in *Olmsted v. Keyes*, 85 N. Y. 593, 600, "as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and bona fide transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming, and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will, and it has been well said that, if ⁵²³ he could not do this, life policies would be deprived of a large share of their utility and value." There is abundant authority for holding that a life policy valid in its inception may be assigned to one not having an insurable interest in the life of the assured when not used as a cloak for a wager or mere speculation in the life of another. The exigencies attending such a transaction are strongly set forth in *Murphy v. Red*, 64 Miss. 614, 618, 60 Am. Rep. 68, 1 South. 761, where the court say: "A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums and afterward become unable to pay more, and, if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it on the ground that, if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling, is, as matters of law, extremely fanciful and unsatisfactory." Such, also, is the reasoning in *Bursinger v. Bank of Watertown*, 67 Wis. 79, 58 Am.

Rep. 848, 30 N. W. 290. See, also, *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Stevens v. Warren*, 101 Mass. 564; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; and a comparatively recent case from Indiana (*Nye v. Grand Lodge*, 9 Ind. App. 131, 36 N. E. 429) ably and exhaustively considered, where the learned jurist announcing the opinion differentiates the *Warnock*, *Hazzard*, and *Kessler* cases.

The reasoning of this line of authorities impresses us as cogent and sound, and we feel free to adopt the doctrine thus announced as more salutary, and better calculated to ³²⁴ serve the ends of justice, than that which seems to have been promulgated by the authorities herein first alluded to, if there is any real distinction when the cases are properly considered with reference to the facts that control them. Now, to apply the doctrine to the case in hand. Brett was a cousin of the assured, which was not a sufficient blood relationship to give him an insurable interest in the life of the latter. It was legitimate for him to take an assignment of the policy, the rules of the order not inhibiting it, for security for any advance made on the faith of it (*Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Insurance Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012), and, if the transaction was conceived in good faith, and not with a view to avoiding the inhibition of the law against wagering contracts, the alleged agreement for the assignment of the policy by the assured, the beneficiaries consenting, would be valid to carry the entire interest in the policy to Brett. But, if not so contrived, it would, at any rate, be sufficient for Brett's reimbursement for all outlays made upon the faith of it, such as a reasonable expenditure for bringing the assured to his home at Spokane, providing him with a home, and the payment of the dues, assessments, and funeral charges, and the defendants Warnick would be entitled to the balance. The complaint is sufficient in either view, and it is a question of fact, for the court to determine whether the alleged agreement falls under the ban of the law as a wagering contract, and therefore entitling Brett to recover only his outlay made in pursuance thereof, or whether the agreement was entered into in good morals, and in consequence he should recover the entire proceeds of the policy.

The decree of the trial court will be reversed, and the cause remanded for such other proceedings as may seem meet, not inconsistent with this opinion.

As to Whether an Insurance policy can be assigned to one who has no insurable interest in the life of the assured, see the monographic note to Chamberlain v. Butler, 87 Am. St. Rep. 506-508; Hinton v. Insurance Co., 135 N. C. 314, ante, p. 545, and cases cited in the cross-reference note thereto. As to what constitutes an insurable interest in the life of another, see Hinton v. Insurance Co., 135 N. C. 314, ante, p. 545, and cases cited in the cross-reference note thereto. And as to whether the beneficiary in a life insurance policy or benefit certificate has a vested interest in the fund, see Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; Middeke v. Bolder, 198 Ill. 590, 92 Am. St. Rep. 284; United States Casualty Co. v. Kacer, 160 Mo. 201, 92 Am. St. Rep. 641.

FERGUSON v. RAY.

[44 Or. 557, 77 Pac. 600.]

TREASURE-TROVE.—Gold-bearing Quartz Found Buried in the earth where it evidently had been placed some years before is not treasure-trove. (p. 650.)

LOST or Abandoned Property.—A Piece of Gold-bearing Quartz found imbedded in the earth, it evidently having been detached from the ledge at some previous time by human agency, and having at one time been contained in a cloth sack, and the nearest trees bearing marks apparently made to aid in locating the property, is neither lost nor abandoned in the sense that the finder is entitled to it as against the owner of the soil. (p. 652.)

LOSS and Abandonment of Property.—The Distinction between losing and abandonment is, that one is involuntary, while the other is by intent or design. But the result is practically the same, if the owner does not appear to claim the property. In the one case the finder has the right of possession against all except the true owner; in the other, he acquires the absolute property by right of his occupancy. (p. 653.)

FOUND PROPERTY—Rights of Owner of the Soil.—If property, not treasure-trove, is found imbedded in the soil under circumstances repelling the idea that it has been lost, the presumption is that the possession of the article is in the owner of the locus in quo. (p. 656.)

W. D. Fenton, A. S. Hammond and A. E. Reames, for the appellant.

E. B. Dufur and H. H. Riddell, for the respondent.

557 **WOLVERTON, J.** Replevin action by Robert A. Ferguson against Charles R. Ray. The plaintiff, being in possession of defendant's premises under a lease, while cutting wood thereon in the **558** afternoon of November 14, 1901, discovered a rich specimen of gold-bearing quartz lying on top of the

ground. He at once secured a pick and shovel, and on scraping the leaves away he found one or two other small pieces "on top," as he testified, "or almost on top of the ground, sticking through the ground." On digging through the surface he found others, extending to the depth of ten or twelve inches, in all weighing, approximately, seventeen and one-half pounds. There were no indications present of any natural ledge or lode of gold-bearing or other quartz in place, or of any pocket or placer or other natural deposit, the formation in which the specimens were imbedded being described as "a loose surface soil." Plaintiff disposed of a part of the quartz, estimated as being half of it in value, and delivered the remainder, eight and three-fourths pounds in weight, to defendant Ray. He now brings trover for the quartz thus delivered to the defendant, alleging that it was obtained from him through duress and threats of arrest and imprisonment and false and fraudulent representations. The defendant answers (1) that the specimens were his property by reason of having been extracted from his land, and (2) by virtue of an agreement entered into between him and the plaintiff, whereby, upon an ascertainment of values and an accounting, defendant was to pay plaintiff one-half of the excess value, if any should appear, between the rock delivered to defendant and that disposed of by plaintiff.

The evidence shows that two trees standing nearest the place of discovery bear some old marks, consisting of one or more blazes, as if made with an ax, and indentations having the appearance of being struck with a hammer or some blunt instrument; that another has been partially peeled, apparently at a more recent date; that many trees and shrubs in the vicinity contain the marks of an ax, and that many more have been cut away and made into wood. The plaintiff testified touching the ore that "it had the ⁵⁵⁹ appearance of having been placed there at some time long ago." Another witness testified that the quartz had at one time been connected with a vein, and had been broken out; that there were indications of the marks of a pick or hammer upon portions of it, as it had the appearance of having been bruised, and that the break was evidently very old; and still another (using his language): "I found evidence of some kind of old cloth there—duck cloth. The ground was stained around a small place there, of a dark brown stain. I even found a few old duck ravelings—their impression—on the dirt I dug up. They were decayed through until they would not hold together, and the ground about it for a space of four

or five feet was stained with this dark brown stain, or about the color of it, and parts of it showed prints of old cloth of some kind, and a few old ravelings that were perfectly rotten. I tried to pick them up, and they would not hold together." No evidence was adduced of a different trend or tendency relative to the finding or the place thereof, or of the circumstances and conditions attending either. Upon this condition of the record defendant moved for a nonsuit, which being denied, and judgment having been rendered adverse to him, he brings this appeal.

⁵⁶¹ 1. The theory upon which the cause is sought to be maintained is that the quartz, the subject of the dispute, was either lost or abandoned property, and that in either event plaintiff is entitled to its possession or value as against the defendant and all others except the true owner. As the property was found beneath the surface of the earth, not upon it, the question has been presented whether or not it is treasure-trove. We are firmly impressed that it cannot be so considered. Treasure-trove, and its legal status, according to Blackstone, "is where any money, or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king. But if he that hid it be known, or afterward found out, the owner, and not the king, is entitled to it. Also if it be found in the sea, or upon the earth, it doth not belong to the king, but to the finder, if no owner appears. . . . Formerly all treasure-trove belonged to the finder, as was also the rule of the civil law. Afterward it was judged expedient for the purposes of the state, and particularly for the coinage, ⁵⁶² to allow part of what was so found to the king, which was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder"; 1 Blackstone's Commentaries, Lewis' ed., c. 8, *295, 296. Bouvier gives the same definition, except that he adds that it includes not only gold and silver, but whatever may constitute riches, as vases, urns, statues, etc.: Bouvier's Dictionary. Mr. Chief Justice Appleton declares that "nothing is treasure-trove except gold and silver": *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600. So, according to an article found in the *Law Times*, volume 81, page 21, the prerogative of treasure-trove is strictly limited, and touches only gold and silver plate and bullion, discarding the baser metals; and in *Elwes v. Brigg Gas Co.*, L. R. 33 Ch. D. 592,

it is said that Roman coins, not being gold or silver coins, did not fall within the royal prerogative of treasure-trove. A case has come to our notice where it seems to have been conceded that certain cups, a chalice, pyxes, and a paten, all of silver, were treasure-trove (*Attorney General v. Moore*, L. R. 1 Ch. D. 676), and another where solid gold rings and ornaments were so classed: *Queen v. Thomas*, 33 L. J., N. S., 22. In a case from Pennsylvania (*Huthmacher v. Harris*, 38 Pa. St. 491, 80 Am. Dec. 502), the court say, however, of treasure-trove: "Though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals." This is manifestly an enlargement of the common-law idea of the term, and we have been unable to find any cases that go beyond it.

We find expressions by Chancellors Walworth and Kent, however, that would seem to give it further scope, even to the extent of comprising all chattels or goods hidden. We ⁵⁶³ quote from the former in *McLaughlin v. Waite*, 5 Wend. 405, 21 Am. Dec. 232: "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth, or in the sea, if no owner appears to claim them, it is presumed they have been intentionally abandoned by the former proprietor; and as such they are returned into the common mass of things, as in a state of nature." And from the latter in his *Commentaries* (2 *Kent's Commentaries*, *357): "Nor does this right of acquisition [by finding] extend to goods found hidden in the earth, and which go under the denomination of treasure-trove. Such goods, in England, belonged to the king." It is at once apparent, however, that neither of these distinguished jurists was attempting to define treasure-trove, but was distinguishing it as it respects the rights of the finder from goods found upon the surface of the earth; hence that they intended no innovation upon the common-law idea of the term. Indeed, Chancellor Walworth cites as his sole authority from volumes 1 and 2 of *Blackstone's Commentaries*, the substance of which, as it relates to the subject in hand, we have quoted above; and it is only upon the principle indicated that the

citation supports him at all. But, without further reference to the authorities, or attempting to define more precisely the scope and meaning of the term "treasure-trove," we may very safely conclude that, in view of the nature of the property in controversy, it does not fall within the classification. It is neither gold nor bullion. It is simply what may be correctly denominated gold-bearing quartz. The testimony varies touching the relative weight of the gold as compared ⁵⁶⁴ with the rock in which it is carried, the estimates ranging from one-fourth to three-fourths, but it is manifest that in either extreme it cannot be fitly or properly styled bullion, and there is clearly nothing else that will give it the stamp of treasure-trove.

2. This brings us back to the real controversy: Was it lost or abandoned property, or, rather, does the evidence suffice to carry the case to the jury upon that contention? The novelty of the affair is such as to induce hesitation, and to involve us in some doubt; but a careful survey of the authorities impresses us that it cannot be characterized as either lost or abandoned in the sense that the finder is entitled to its possession or ownership as against the owner of the soil. Nor do we think that any reasonable inference that such is its nature and character can be deduced from the evidence, and the case, therefore, is not one proper for the jury to pass upon. It has been very well understood in this jurisdiction, since the case of *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, and the more recent one of *Danielson v. Roberts*, 44 Or. 108, ante, p. 627, 74 Pac. 913, 65 L. R. A. 526, what is meant by lost or abandoned property. To lose is casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event; and, if the property is found on the surface of the earth, the conditions suggest that it has been intentionally abandoned, and as such has returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing (1 Blackstone's Commentaries, Lewis' ed., c. 8, *295, 296; 2 Blackstone's Commentaries, Lewis' ed., c. 26, *402; 2 Kent's Commentaries, *356; *McLaughlin v. Waite*, 5 Wend. 405, 21 Am. Dec. 232), the distinction between losing and abandonment being that one is involuntary, while the other is by intent or design. But the result, as it relates to the property, is practically the same, the owner not appearing to lay claim to it. In the one case the finder ⁵⁶⁵ has the right to the possession against all except the true owner. In the other he ac-

quires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier, the presumption being disputable by the rightful owner. Such presumption or inference does not obtain as to property intentionally left or deposited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory or want of memory of the owner as to the locality at any given moment. "In such case," says Baron Parke, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict."

The principle is amply illustrated in the cases. In *Lawrence v. State*, 1 Humph. 228, 34 Am. Dec. 644, a customer placed his pocketbook on a table in a barber-shop, and, his attention being attracted to the outside, went out, forgetting it. The barber discovered the pocketbook, and attempted to appropriate it, and it was held that it was not lost property. In *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733, the plaintiff picked up a pocketbook in a barber-shop, and handed it to the barber, but, the owner not appearing to claim it, sued to recover it. In disposing of the case Mr. Justice Dewey says: "This property is not, under the circumstances, to be treated as lost property in that sense in which the finder has a valid claim to hold the same until called for by the true owner. The property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there, and has never called for it. The plaintiff also came there as a customer, and first saw the same, and took it from the ~~see~~ table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant . . . to use reasonable care for the safekeeping of the same until the owner should call for it": See, also, *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. 460. The circumstances must be such, considering the place and the conditions under which the property was found, as to lead to the inference that the property was casually or involuntarily left where found, or there can be no losing. This is well illustrated by the case of *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528. Plaintiff bought an old safe, and left it with his

agent to sell, who in turn left it with defendant for a like purpose. The defendant, in looking through it, found a roll of bills, amounting to one hundred and sixty-five dollars, between the wooden lining and the sheet-iron exterior, which could only have gotten or been placed there through a large crack in the lining. The court said: "We think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped or was accidentally shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit."

The circumstances and conditions of the place where found afforded the indicia from which the inference of a losing was deduced. Now, in the case at bar, the quartz was not found on the surface of the earth. True, a small piece or so was picked up from the surface, but, if this were all, there would have been no controversy. The remainder was found imbedded in the earth, and the presumption that it was lost which attends property found on ⁵⁶⁷ the surface of the earth is wanting, so that there was no inference for the jury, deducible from the place of finding and the conditions of the property, that it was lost property. Indeed, the evidence, it would seem, refutes any such presumption or inference. The property was valuable. It had certainly at some time previous been detached by human agency from a ledge, its natural place of deposit; and the evidence that it was once contained in a bag of some kind of cloth, and that trees nearest the place of finding bore some old marks, apparently made by design to aid in locating the property, would indicate that it was voluntarily deposited where found. What effect the elements have had upon the conditions and position in which it was left could only be the merest conjecture. In any event, there could be no inference of a losing or abandonment from the conditions present at the finding, and this is all the knowledge we have respecting the matter; so that the case was not such as was proper to be left to the jury for their determination upon the theory that the property was lost or abandoned.

The case, to our mind, falls within the principle of a class of cases which we will now notice, and which counsel for defendant rely upon as controlling. The one most nearly illustrative is *South Staffordshire Waterworks v. Sharman*, 65 L. J.,

N. S., 460. The subject of the controversy there was two gold rings found by a laborer in a pool upon the premises of his employers. He was engaged in cleaning out the pool, and, after throwing out large quantities of mud, came upon the rings and some other articles of interest. Lord Russell, in announcing his opinion, quotes from Pollock and Wright on Possession in the Common Law, pages 40, 41, as follows: "The possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it ~~was~~ also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to anyone who requires a specific intention as part of de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession, constituted by the occupier's general power and intent to exclude unauthorized interference." And then says: "It is upon the principle expressed in this [the latter] passage that I base my judgment, for it shows the broad distinction between the present case and the case contemplated in the passage cited to us in course of the argument from Blackstone's Commentaries, showing that a jewel cast into the sea or on the public highway could not be said to be in the possession of anyone, because no one had a right to exclude another from the public place"; and concludes as follows: "The general principle is that where anyone is in possession of house or land which he occupies, and over which he manifests an intention of exercising a control and preventing unauthorized interference, and something is found in that house or on that land by a stranger or a servant, the presumption is that the possession of the article found is in the owner of the locus in quo."

Another case is noted in Law Notes (volume 7, No. 8, page 160), decided by supreme court Justice Forbes of New York, not so authoritative as the preceding one, as it does not come from a court of appeals, but the principle is recognized. Some ancient dishes, supposed to have been buried by Colonel Edmeston, an officer in the French-Indian war, one hundred and fifty years ago, at a time when he was obliged to flee from the Indians, were recently plowed up, and it was held as to them to be well established that where a thing is imbedded in the soil the right to it is in the owner of the land, unless it is of such a character as to constitute treasure-trove. Other cases announcing the same principle are *Elwes v. Brigg Gas Co.*, 14

R. 33 Ch. D. 592; *Regina v. Rowe*, ~~see~~ Bell's C. C. 93. Now, we have here property not treasure-trove, found imbedded in the soil under circumstances repelling the idea that it has been lost. How long a time it had been in the place where found is conjectural, of course, but it had probably been there many years—long enough, at least, that only a trace of the cloth bag that once contained it was left; and the ownership of the land where found is in the defendant. Being in the possession of the land, and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, as was announced by Lord Russell in *South Staffordshire Waterworks v. Sharman*, 65 L. J., N. S., 460, that "the presumption is that the possession of the article found is in the owner of the locus in quo."

There was error, therefore, in denying the nonsuit, and the judgment appealed from will be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

Lost Property and Treasure-trove and the rights therein of the finder are discussed in *Danielson v. Roberts*, 44 Or. 108, ante, p. 627, and cases cited in the cross-reference note thereto. According to *Goddard v. Winchell*, 86 Iowa, 71, 41 Am. St. Rep. 481, an aerolite becomes part of the soil on which it falls and in which it is imbedded, and is the property of the owner of the land as against one who finds and removes it.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. STILL

[68 S. C. 37, 46 S. E. 524.]

ADULTERY—Proof of Marriage.—The fact of marriage may be proved by general reputation and the declarations of the parties in a prosecution for adultery. (p. 657.)

TRIAL—Practice—Waiver of Exception.—If the trial court in charging the jury commits error in stating that the defendants admit certain facts, attention must be called to it at the time, or an exception thereto is waived. (p. 658.)

J. O. Patterson and C. A. Best, for the appellants.

Assistant Attorney General Townsend, for the state.

³⁸ GARY, J. The defendants were convicted of adultery, and have appealed to this court upon exception—the first two of which raise the question whether it was competent for the state to prove the fact of marriage by general reputation and the declarations of the parties. The defendants contended that “marriage in a criminal action cannot be proved by hearsay evidence, but that the witnesses who were present are the proper parties to prove it by, if there was ever any marriage.” The rule of evidence in cases of adultery is the same as that in bigamy; and whatever may be the rule elsewhere, it is settled in this state, that the fact of marriage may be proved by general reputation and the declarations of the parties: *State v. Briton*, 4 McCord, 256; *State v. Hilton*, 3 Rich. 434, 45 Am. Dec. 783. This principle is also sustained by numerous other decisions, among which may be mentioned *Miles v. United States*, 103 U. S. 311, 26 L. ed. 481, and *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373.

The next assignment of error is: "Because his honor erred in charging the jury that 'The defendants at the bar admit they are married'; whereas, it is respectfully submitted that this was erroneous, as the defendants did not testify or make any admissions." This will be considered in connection with the remaining assignment of error, which is as follows: "Because his honor erred in charging the jury: 'Was Lavinia Still lawfully married at the time that she and her codefendant married?' whereas, we respectfully submit that this was charging upon an assumed fact, which was erroneous and calculated to mislead the jury, in that it indicated that the fact of the marriage was established by evidence." If, in stating to the jury the issues involved, the presiding judge erred in supposing that the defendants admitted they were married, it was their duty ³⁰ to have called the alleged error to his attention, and having failed to do so, they cannot make his charge in this respect the basis of an appeal to this court. We reach this conclusion with less reluctance, as the jury might have found very properly from the testimony that the defendants were guilty of adultery, even if they were married, provided they also found that Lavinia Still and Bud Still were previously married. All the exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Proof of Marriage may, according to the weight of authority, be made, in criminal prosecutions for bigamy and kindred offenses, by evidence of the conduct, cohabitation and declarations of the defendant: See the monographic note to *Hiler v. People*, 47 Am. St. Rep. 228-232; *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163; *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50. This doctrine is applied to prosecutions for adultery in *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *State v. Libby*, 44 Me. 469, 60 Am. Dec. 115; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410.

GLENN v. RUDD.

[68 S. C. 102, 46 S. E. 555.]

MORTGAGES—Merger.—Contract Against merger and satisfaction of a mortgage by conveyance to the mortgagee need not necessarily be in writing and inserted in the conveyance. It may rest in parol. (pp. 660, 661.)

E. S. Blease and G. T. Graham, for the appellant.

B. W. Gouch and C. J. Ramage, for the appellees.

WOODS, J. The defendant sets up as one of his defenses to the plaintiff's complaint for dower, filed in the probate court for Saluda county, that in 1891, S. H. Rudd, his grantor, who was the real owner of the land, and her husband, C. F. Rudd, made a deed of conveyance covering the land described in the complaint to Berry Glenn, Jr., plaintiff's husband, who contemporaneously executed a mortgage to S. H. Rudd and her husband for the purchase money, upon which plaintiff renounced her right of dower; that Berry Glenn, Jr., being unable to pay the mortgage, reconveyed the land to S. H. Rudd, and that "at the time Berry Glenn, Jr., conveyed said premises unto the said S. H. Rudd, it was expressly stipulated and agreed by and between the said parties that the mortgage that was executed by Berry Glenn, Jr., to said S. H. Rudd and C. F. Rudd to secure the payment of the purchase money of said premises as aforesaid, should stand open to protect S. H. Rudd from dower and other liens and encumbrances thereon, and the defendant avers that said mortgage was not extinguished but still stands open, and if plaintiff ever had any right of dower in said premises (which this defendant again specifically denies), the same is subordinate to the said mortgage." The plaintiff demurred to this defense, "for the reason that it is not alleged that said agreement and stipulation was in writing and contained in the deed from Berry Glenn, Jr., to Mrs. S. H. Rudd in the form of a covenant." The demurrer was sustained by the probate judge, and on appeal to the circuit judge, his judgment was affirmed.

There are a number of exceptions, but the decisive question is, whether an agreement that a mortgage shall not be merged in the title and be satisfied when the mortgagee takes title to the mortgaged property is without effect, unless reduced to writing and incorporated in the deed of conveyance.

In the leading case of *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237, ¹⁰⁴ it was held that an express agreement, which was inserted in the conveyance to the mortgagee, that the mortgage should remain open prevented merger and satisfaction of the mortgage. It is true the court said, in *Blackeley v. Branyan*, 26 S. C. 424, 2 S. E. 319: "We cannot venture to go further in relieving a mortgagee who purchases the mortgage property than was indicated in the case of *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237. And in *Agnew v. Renwick*, 27 S. C. 572, 4 S. E. 223, it is said, the only exception to the rule recognized in this state, that the purchase of the mortgaged property by the mortgagee will extinguish the mortgage, is that established in *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237. Both these cases, however, and *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307, were decided on the ground that there was no evidence, either written or parol, of any agreement that the mortgage should remain open. The decision in *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237, is based on the ground that there was an agreement that the mortgage should remain open. There is not the slightest intimation in the opinion that the fact that the agreement was evidenced by its insertion in the deed added anything to its efficacy. Taking the view adopted by our court, it cannot be doubted it is the contract between the parties that prevents the merger. All parol contracts are valid unless required by statute to be in writing, and in the absence of any statutory provision, we can see no ground upon which a court can hold that a contract against merger must be in writing or be inserted in a particular instrument.

The view taken in the cases above referred to, that an express contract is necessary under all circumstances to prevent satisfaction of the mortgage by conveyance to the mortgagee, seems to be at variance with that adopted in most other jurisdictions, and, indeed, not in accordance with the authorities cited with approval in the leading opinion in *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237. Even in those states where, as in this state, the mortgagee has not title to the land, but merely a lien for the debt, it has been generally held that a merger will not result from conveyance of the land to the mortgagee, ¹⁰⁵ where there is an intervening encumbrance, even where there is no evidence of any agreement to that effect, because, unless there is actual proof of an intention to satisfy the mortgage, it is presumed the mortgagee does not in-

tend to release his security when it is necessary for his protection against such intervening encumbrance: *Scrivner v. Dietz*, 85 Cal. 295, 24 Pac. 171; *Woodward v. Davis*, 53 Iowa, 624, 6 N. W. 74; *Gibbs v. Johnson*, 104 Mich. 120, 62 N. W. 145; *Millsbaugh v. McBride*, 7 Paige, 509, 34 Am. Dec. 360; *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Factor's Ins. Co. v. Murphy*, 111 U. S. 745, 4 Sup. Ct. Rep. 679, 28 L. ed. 582.

This view of merger seems to receive support from the opinions of this court in *Michalson v. Myrick*, 47 S. C. 297, 25 S. E. 162, and *Lipscomb v. Goode*, 57 S. C. 182, 35 S. E. 493, though the rights of purchasing mortgagee were not involved in these two cases. Upon this question of presumption we express no opinion, because it is not involved in this case, but in view of the adjudications in other jurisdictions and the apparent difficulty of reconciling the doctrine stated in *Michalson v. Myrick*, 47 S. C. 297, 25 S. E. 162, and *Lipscomb v. Goode*, 57 S. C. 182, 35 S. E. 493, with that held in *Agnew v. Renwick*, 27 S. C. 572, 4 S. E. 223, *Bleckley v. Branyan*, 26 S. C. 424, 2 S. E. 319, and *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307, we are certainly unwilling to extend the rule laid down in the three cases last mentioned by holding that the contract against merger and satisfaction of a mortgage by conveyance to the mortgagee must necessarily be in writing and inserted in the conveyance.

The judgment of this court is that the judgment of the circuit court be reversed.

The Merger of a Mortgage where the mortgagee becomes the owner of the fee is discussed in the recent note to *Forthman v. Deters*, 29 Am. St. Rep. 160-171.

STATE v. McDANIEL.

[68 S. C. 304, 47 S. E. 384.]

MURDER—Evidence.—Reputation of Deceased for Drunkenness is not relevant or admissible on a murder trial when the defense is accidental killing and the issue is whether or not the deceased was treacherous and violent when drinking. (p. 663.)

MURDER—Evidence.—The relations between the deceased and the defendant, whether friendly or not, may be shown upon a trial for murder, and these may be shown by the effort of the defendant to secure the election of another person as town marshal at the time deceased was elected to that position. (p. 664.)

WITNESSES—Evidence to Impeach.—If evidence of a contrary statement by a witness is offered to impeach him, it is not competent, in reply, to admit evidence that the witness has on other occasions made statements similar to the one testified to, except when it is charged that there is a disposition to misstate in consequence of a change of relation to a party or to the cause, and then it may be shown that the witness made similar statements before such relation existed. (p. 664.)

MURDER.—Evidence that the Deceased had no Powder Burns on His Hands is admissible on a murder trial, in reply to evidence tending to prove that the deceased had hold of the pistol when shot. (p. 665.)

EVIDENCE—Declarations as Res Gestae.—Declarations, to be admissible as part of the *res gestae*, must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. (p. 666.)

MURDER—Malice.—An Instruction in a murder case that "in this case, if defendant intentionally, wrongfully, killed deceased without justification or excuse, then he killed him with malice, and that would constitute murder," is not erroneous as charging on the facts, and properly defines malice and murder. (pp. 667, 668.)

MURDER.—Malice is Presumed from an intentional killing of a human being. (p. 668.)

MURDER—Accidental Killing—Burden of Proof.—If accidental killing is set up as a defense to murder, it is not an affirmative defense, and the prosecution must overcome such plea by a preponderance of the evidence, and beyond a reasonable doubt. (pp. 672, 673.)

Efird & Dreher, G. T. Graham and L. F. Youmans, for the appellant.

J. W. Thurmond, solicitor, and W. H. Sharpe, for the state.

³⁰⁵ JONES, J. This case was first heard at the April term, 1903, of this court, but an order for rehearing having been made, it was heard again at the present term.

The defendant was tried at Lexington, February term, ³⁰⁶ 1903, under an indictment for the murder of John L. Neece at Swansea, Lexington county, on the twenty-fourth day of December, 1902. The jury rendered a verdict of guilty, with recommendation to mercy, and sentence of life imprisonment was imposed, from which he now appeals upon exceptions to the court's rulings as to the admissibility of testimony and charge to the jury.

The first exception alleges error in not allowing the witness, Hildebrand, to testify as to the reputation of deceased for drinking, in that one issue raised by the defendant was that

deceased was a violent and treacherous man when drinking, and that he was intoxicated at the time of the difficulty. The court did not restrict defendant in showing the reputation of the deceased for violence when drinking, and that deceased was drinking at the time of the difficulty. The reputation of the deceased for drunkenness was not relevant. In a prosecution for murder, evidence of the general bad character of the deceased is irrelevant, but evidence of his character or reputation for violence, treachery, etc., is admissible, under a plea of self-defense: *State v. Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891. There was no plea of self-defense in this case; on the contrary, counsel for defendant expressly declared on trial that defendant did not plead self-defense, but plead homicide by accident.

A second exception assigns error in not allowing defendant to testify that he had received a message from the deceased concerning the discharge of blank cartridges within the corporate limits of the town on the day of the difficulty. The deceased was marshal of the town of Swansea, and it seems there was an ordinance of the town against the firing of guns within the corporate limits. The defendant kept a store in Swansea, and was celebrating Christmas Eve by firing several blank cartridges from a shotgun while standing in his store door. The homicide, whether intentional, as contended by the prosecution, or accidental, as contended by the defense, was the result of a struggle between the ³⁰⁷ defendant and the deceased, growing out of the deceased's attempt to arrest defendant for the alleged unlawful shooting of the gun. The court ruled that defendant could not testify as to any message delivered by a third person as coming from the deceased marshal about shooting blank cartridges; but later, all objection being withdrawn, the defendant was permitted to testify fully as to the said message as received by him; and the bearer of the message, Joe Adams, testified as to the same, which was to the effect that the marshal permitted or did not object to the shooting of blank cartridges. The exception is, therefore, without foundation.

The third exception complains that there was error in allowing and compelling defendant to testify as to his action and that of the town council of Swansea in the election of a town marshal, in that said testimony showed a difference between the defendant and the town council, an entirely collateral issue, not competent in this case and prejudicial to the defendant. The solicitor, as it appears, was endeavoring, on the

cross-examination of the defendant, to show that defendant had some ill-will or unfriendliness to the deceased, by bringing out that defendant had tried to secure the election of another marshal at the time deceased was elected. The question propounded and admitted over defendant's objection was, "You tried to get in another marshal, did you?" The question was competent for the purpose of showing whether the relations of defendant and deceased were friendly.

The fourth exception charges error in refusing to allow defendant's witness, Redmond, to be asked on redirect examination whether his testimony at the coroner's inquest was to the same state of facts as his testimony on the trial. The solicitor had cross-examined the witness as to his statements in an affidavit used in an application for bail, with a view to show contradictory statements, and appellant contends that the testimony proposed was competent on redirect examination. It would, doubtless, be competent, after a witness has been cross-examined respecting ³⁰⁸ a former statement made by him, for the party who called him to re-examine him as to the same statement, as in *State v. Turner*, 36 S. C. 538, 15 S. E. 602; but where evidence of contradictory statements by a witness is offered by way of impeaching the witness, it is not competent in reply to offer evidence that the witness has on other occasions made statements similar to what he has testified in the cause: 1 *Greenleaf on Evidence*, sec. 469; 10 *Ency. of Pl. & Pr.* 330; *Davis v. Kirksey*, 2 Rich. 176; *State v. Thomas*, 3 Strob. 269. There is an exception to this general rule, making such testimony competent when it is charged that there is a design to misrepresent in consequence of the relation of the witness to the party or to the cause, by showing similar statements made before the relation existed: 10 *Ency. of Pl. & Pr.* 330; *State v. Thomas*, 3 Strob. 269. This exception to the general rule is illustrated in *Lyles v. Lyles*, 1 Hill Ch. 76; for in that case it was charged that the witness alleged to have made contradictory statements, had been induced to testify as he did on the trial by hope or promise of money, and so it was competent to show in reply that the witness had been heard to make statements similar to his testimony at a time previous to the alleged improper relation to the cause. It does not appear that the present instance falls within the exception. There is no ground for a distinction in questions of this kind between testimony on re-examination after cross-examination of same witness and independent testimony. In the case of *State v. Gilliam*, 66 S. C.

419, 45 S. E. 6, it was held it was not competent to corroborate the testimony of defendant's witness at the trial by showing that the witness made similar statements at the coroner's inquest.

The fifth exception imputes error in allowing W. R. Barra to testify that there were no powder burns on deceased's hands, because not in reply to any testimony offered by defendant. The defendant and one of his witnesses, Joe Adams, had testified that when the pistol fired, both defendant and deceased had hold of it, the defendant by the stock and the deceased by the barrel. The ³⁰⁰ testimony that there was no powder burns on deceased's hands had some tendency to show that deceased did not have hold of the barrel of the pistol at the time it was fired, and thus was in reply to defendant's testimony.

The sixth exception alleges error in not allowing the witness, Hildebrand, to testify to the declaration of the defendant immediately after the shooting, and in holding that the same was not part of the *res gestae*. The case shows the following in reference to this matter:

"Q. Did he say anything about shooting being accidental?

A. On the way to his house he did.

"Q. (The Solicitor.) Only just what occurred then? A. He asked me to go home. I said for him to go home, as I thought there would be some of Neece's friends—

"Q. (Mr. Eford.) How far were you from the store when he told you this? A. We had just stepped out.

"Q. How long was it after shooting before you and he stepped out—how long between the shooting and the time you went out? A. It was not two minutes, I hardly think. He said, I will take your advice if you go with me; I will go if you go with me to my house, and this was before we got to the house.

"Q. How far from the store to McDaniel's house is it? A. About one square, two or three hundred feet.

"The Court.—I don't think that is part of the *res gestae*."

Hildebrand had previously testified that after the shooting he advised defendant that he had better go away to avoid further trouble, to go and tell his wife. The witness, Johnson, had testified that after the shooting he told defendant he had killed Neece, and that he had got his foot in it; and that defendant said, "No man put your hands on me"; that defendant inquired of Johnson and Hildebrand for the gun; and that Adams got the gun and gave it to defendant, who then went to his house. As stated in the case of *State v. Belcher*, 13 S. C. 463: "When

the inquiry is as to a certain transaction, not only what was done but what was said by those present during the transaction is admissible for the purpose of explaining its character To make declarations a part of the *res gestae*, they must be contemporaneous ³¹⁰ with the main fact, not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then regarded as contemporaneous." If the declarations are a mere narration of a past occurrence they are not admissible as *res gestae*: *State v. Taylor*, 56 S. C. 369, 34 S. E. 939. When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard-and-fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. Accordingly, in *State v. Arnold*, 47 S. C. 13, 58 Am. St. Rep. 867, 24 S. E. 926, the court held admissible as *res gestae* a statement, "Charlie shot me to death," made by a man shot in a doorway of a house from which he staggered some thirty yards and fell, the utterances being made a few minutes after the shooting, to the first persons who reached him in response to his cry for help. The declarations here in question were made probably within two or three minutes after the shooting and within two or three hundred feet of the place of the shooting. These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestae*, but they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influence of the transaction. It is to be remembered that it was in testimony that defendant did not declare that the shooting was accidental, when he saw ³¹¹ that Neece had been shot and when Johnson told him that he had killed Neece, and that, on the contrary, the testimony tended to show that he forbade anyone to put hands on him;

that he had a conversation with Hildebrand as to the advisability of going home to avoid further trouble, and inquired and secured possession of his gun before leaving the store where the shooting took place. No doubt, the circuit court considered that these circumstances tended to indicate a mind which was not then being actively influenced by the transaction to make explanation thereof, but rather a mind adverting to means of future safety. Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be. Moreover, no harm arose to the defendant from the ruling, for the testimony quoted above shows that the witness was allowed to state that defendant, on the way to his house, did say something about the shooting being accidental.

The remaining exceptions relate to the charge, the seventh exception being as follows: "7. His honor erred in charging the jury: 'In this case, if defendant intentionally, wrongfully, killed the deceased, without any justification or excuse, then he killed him with malice, and that would constitute murder'; whereas, (1) the killing of one person by another may have been intentional and wrongful, and yet the circumstances show that the killing was not more than manslaughter; (2) this was charging on the facts." It is very clear that this charge was not in respect to matters of fact, in violation of the constitution, as it is based upon an hypothetical statement of facts. There is no significance in the use of the words, "in this case," which was commented upon in argument. Every charge necessarily relates to the case in hand, whether the court uses such words or not. The first specification of this exception is ³¹² based upon the view that the court, in the charge quoted, should have used words, excluding the circumstances which extenuate an intentional homicide to manslaughter; that is, the charge should have been thus: "If the defendant intentionally, wrongfully, killed the deceased, without any justification or excuse or extenuation (as sudden heat and passion upon sufficient legal provocation), then he killed him with malice, and that would constitute murder." It must be noted here that the court was not attempting in this part of the charge to cover the law as to an intentional homicide upon sudden heat and passion upon sufficient legal provocation. In another portion of the charge

the law as to voluntary manslaughter was fully and correctly stated to the jury, and no exception has been taken thereto. The court here was instructing the jury with reference to murder and malice as an essential ingredient. In the sentence just preceding the one excepted to, the court said: "In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse." This is substantially the famous definition of malice by Bayley, J., in *Bromage v. Prosser*, 10 Eng. Com. L. 321: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." In *State v. Daig*, 2 Rich. 182, our court said: "In law, malice is a term of art importing wickedness and excluding a just cause or excuse." There can be no doubt, under the decisions in this state, that malice is presumed from an intentional killing, in the absence of facts and circumstances in evidence tending to show want of malice: *State v. Hopkins*, 15 S. C. 153; *State v. Ariel*, 38 S. C. 221, 16 S. E. 779; *State v. Jones*, 29 S. C. 201, 7 S. E. 296; *State v. Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440. But the court in this case left it to the jury to decide whether the killing was intentional, and whether there was any justification or excuse, and in that event malice existed, and the killing would be murder. An intentional homicide without any excuse is certainly murder. The language, "without ³¹² any justification or excuse," not only excludes justifiable and excusable homicide, but homicide extenuated to manslaughter, because done in sudden heat and passion upon sufficient legal provocation. It must not be supposed that the word "excuse" is only applicable to excusable homicide, as homicide in self-defense. In the early stages of the common law there was ground for distinction between justifiable and excusable homicide, when the accused was not entitled to an acquittal in case of excusable homicide, but upon special verdict was entitled to pardon; but now the distinction is of no practical importance, as in both cases the accused is entitled to an acquittal, and there is no penalty whatever attaching. It would, therefore, be wrong to hold that the word "excuse" was intended by the court or understood by the jury to be used in the absence of something which renders one wholly excusable or justifiable, but, on the contrary, it should be held to include also any legal extenuation of the offense charged. The dictionaries give as one definition of excuse, "a plea offered in extenuation of a fault or neglect." *Bouvier's Law Dictionary*

says: "This word presents two ideas, differing essentially from each other. In one case, an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty, he is less so than he appears to be." In the case of the State v. Mason, 54 S. C. 240, 32 S. E. 357, the court sustained a charge to the effect that malice is implied from an intentional killing, without justification or excuse.

The eighth exception complains of error in charging the jury in these words: "So if you could suppose a case where it was evident that one person had intentionally killed another, and any other fact about it was evident or known, the law would imply malice from the intentional killing," because no such presumption of malice arises where all the facts are brought out. In the opinion upon the former hearing of this case, we assumed from the context that the word "any," in the charge as above quoted in the exception, was a ³¹⁴ misprint for "no," and held in accordance with the State v. Jones, 29 S. C. 235, 7 S. E. 296, that while the law presumes malice from the mere fact of an intentional killing, yet when the facts attending the homicide are brought out, there is no room for the presumption, and the state must prove the malice from the facts and circumstances without aid from the artificial presumption. In the application for rehearing, it was urged that the charge was printed in accordance with the "case" as agreed upon and with the copy of the stenographic notes as furnished appellant. This court was so impressed with the impropriety of assuming of its own motion to correct the "case" as agreed upon, and the danger of injustice to litigants by establishing such a precedent, that it was induced by this circumstance, along with other circumstances, to grant a rehearing. By subsequent proceedings allowed at the instance of the solicitor, the "case" has been corrected by order of Judge Klugh, and it now appears regularly that the circuit judge used the word "no" instead of the word "any" in the charge to which exception was taken. So corrected, the charge is free from error under the cases cited above on this subject.

The ninth exception is as follows: "9. His honor erred in charging the jury: 'Now, in this case, if the facts and circumstances surrounding the homicide have been brought out before you, then you look to the facts and circumstances and say whether they establish beyond a reasonable doubt the fact of malice on the part of the defendant in taking the life of the deceased, and if so, then your verdict will be guilty of mur-

der'; the error consists (1) in his honor assuming and in pressing on the minds of the jury that defendant had actually killed deceased, when, under the facts in the case, defendant contended that he had not fired the pistol which killed the deceased; (2) this was charging upon the facts." It is too clear for argument that this was not a charge upon the facts, and the following extract from the charge preceding the portion complained of shows that the exception in its first specification is also without ³¹⁵ foundation: "Now, in order for the state to convict a person of murder, where the plea is not guilty, as it is in this case, in the first instance, it is necessary for the state to prove beyond a reasonable doubt the material facts of the indictment. The state must, therefore, prove, first of all, that John Lee Neece is dead; that he came to his death at the hands of some person other than himself, and then must prove that this defendant killed him, and must prove that the killing was done with malice aforethought, whether the malice be express or implied malice. It is a matter for you to determine from the evidence in the case whether these facts are established beyond a reasonable doubt or not. If the state has proved the killing of the deceased by the defendant, then it becomes necessary for you to determine whether the killing was a malicious killing or not. Of course, if the state has not established the fact of the killing of the deceased by the defendant, the case falls to the ground there, and must result in a verdict of not guilty; but if you are satisfied beyond a reasonable doubt that the defendant killed the deceased, then the next inquiry is, Was it done with malice aforethought?"

We next notice the eleventh exception, which assigns error "in refusing to charge defendant's second request, in that one issue raised by defendant, and which there was testimony tending to support, was that deceased attempted unlawfully to arrest defendant, and it was error not to instruct the jury as to full rights of defendant in resisting an illegal arrest." This exception fails to specify wherein the court failed to charge the law as to arrests. The jury were instructed at length on that subject, and no exception is taken to what the court said. The court refused to charge the defendant's second request on the ground that it was incoherent in the form in which it was presented. The charge to the jury fully covered the right of the defendant to resist an illegal arrest, and we see no reversible error in refusing the request in the particular form presented.

The question which is deemed most serious is presented

³¹⁶ in the tenth exception, which imputes error in charging the jury that the plea of homicide by accident is an affirmative defense, which defendant must prove by the preponderance of the evidence. In this connection the court charged: "The defendant, in addition to the plea of not guilty, sets up the plea of accidental killing. Now, where a person comes into court, whether in a civil or criminal case, and sets up an affirmative defense, where he comes in and says that the charge against him would be true but for certain facts which he relies upon, he must establish those facts by the preponderance of the evidence; the rule is the same in a criminal case as in a civil case; and so far as a defendant is concerned in a criminal case, the state must prove beyond a reasonable doubt its side of the case; the defendant is only required to prove by the preponderance of the evidence, which means the greater weight of evidence, the facts that he relies upon by way of excuse or justification. In this case, therefore, the defendant must establish the facts upon which the plea of accidental killing rests by the preponderance of the evidence, and if he has established his plea of accidental killing to that extent, then he is entitled to a verdict of not guilty." He further charged: "So if he has established his plea of accidental killing by the preponderance of the evidence, you must find a verdict of not guilty. If you have a reasonable doubt whether he has established the plea by the preponderance of the evidence, you must give him the benefit of the doubt and find he has established it, and still find a verdict of not guilty. If he has failed to establish the plea of accidental homicide, then you disregard that plea and determine from his other plea of not guilty to the indictment, whether the state has established its case beyond a reasonable doubt or not; and if it has not, you must give him the benefit of the reasonable doubt, and find a verdict of not guilty." Then finally the court charged: "So if you should conclude, in this case, that the defendant was resisting an unlawful arrest, or if you should conclude he was defending himself against unnecessary violence and thus ³¹⁷ engaged in a lawful act, and that while so engaged, he unintentionally, accidentally, took the life of the deceased, that would be an accidental homicide, or a homicide by misfortune, which the law will excuse. But if the defendant has failed to show that to your satisfaction by the preponderance of the evidence, then you, as a matter of course, will disregard that plea of accidental killing and determine whether he is guilty of murder, manslaughter, or not

guilty, upon the indictment and upon the plea of not guilty. Give the defendant the benefit of every reasonable doubt." We have been particular to reproduce all that the circuit court charged in this connection. This charge was given by the court upon being advised by defendant's counsel that defendant plead homicide by misadventure or accident. We are not content with the conclusion which we reached in this opinion on the first hearing of this case, in overruling this exception. The rule has been established in this state that where self-defense is pleaded to an indictment, the defendant must establish it by the preponderance of the evidence, but at the same time the guilt of the accused must be made to appear beyond a reasonable doubt: *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 33 S. C. 132, 11 S. E. 624. Whether such a rule as applied to self-defense is sound or practically useful, we need not now inquire. If there is no distinction between self-defense and homicide by accident, when set up by plea and evidence, then, unquestionably, the circuit court charged the jury correctly, as he charged in accordance with the law as laid down in repeated decisions concerning self-defense as an affirmative defense. But we do not think that a defense that the homicide was accidental is in any sense an affirmative defense. It is distinguishable from self-defense as a plea, which admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm; whereas a defense of homicide by accident denies that the killing was intentional. In *Commonwealth v. McKie*, 1 Gray, 61, 61 Am. Dec. 410, the logical rule is thus stated: "Where the defendant sets up no ³¹⁸ separate independent fact in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains on the government to satisfy the jury that the act was unjustifiable and unlawful." In the case of *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, the court held that the defense of accidental killing is a denial of the criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. It was error, therefore, to instruct the jury to disregard the plea of accidental homicide, if the defendant failed to establish it by the preponderance of the evidence. It is true, the charge did finally impose upon the state the duty of establishing the charge beyond a reasonable

doubt, but it will be observed that this last instruction was conditioned on defendant's failure to establish an accidental killing by the preponderance of the evidence. The error consisted in charging that the burden of proof had shifted to the defendant at all on the question whether the killing was accidental. For this material error, in an otherwise exceedingly clear and able charge, the judgment must be reversed.

The judgment of the circuit court is reversed and the case remanded for a new trial.

Where the Defense of Accidental Shooting is set up, it has been held error to instruct the jury that the fact of shooting and killing raises a presumption that the accused intended to injure the deceased, and that the burden is on the accused to show the accident: Richardson v. State, 32 Tex. Cr. Rep. 524, 24 S. W. 894. Compare State v. Bonds, 2 Nev. 265. But malice is said to be implied from every intentional homicide, and any circumstances of accident, necessity or infirmity extenuating or excusing the act must be satisfactorily proved by the defendant, except so far as they are disclosed by the proof against him: Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711; State v. Bowles, 146 Mo. 6, 69 Am. St. Rep. 598.

HUGUENOT MILLS v. JEMPSON & COMPANY.

[68 S. C. 363, 47 S. E. 687.]

CORPORATIONS—Partnership—Sale of Goods.—A corporation may acquire, as against outsiders, part ownership of property bought in part with corporate funds in the progress of an attempted partnership with an individual, and when it sells such property and has acquired all of the interest of such individual therein, it alone is entitled to collect the purchase price. (p. 676.)

SALES, EXECUTORY—Breach of Contract—Damages—Resale.—Under an executory contract of sale, the seller may retain the goods and sue for damages upon the purchaser's refusal to receive them, without reselling them. (p. 676.)

SALES—Executory Contract—Breach—Measure of Damages to the seller for a breach of an executory contract for the sale of goods is the difference between the contract price and the market price at the time the goods should have been accepted by the purchaser. (pp. 676, 677.)

SALES—Statute of Frauds.—An executory contract for the sale of goods, evidenced by a bill of the goods and a letter in response thereto, is not within the statute of frauds. (p. 677.)

EVIDENCE.—Letters Signed by an Individual may be shown by parol to have been written by him for a partnership of which he is a member. (p. 677.)

AGENCY.—Evidence of the fact that a person is purchasing agent for others than his partnership is not competent to prove that in a particular instance he acted for his firm, if the seller has no notice that he is purchasing agent for such others. (p. 678.)

McCullough & McSwain, for the appellant.

Haynsworth, Parker & Patterson, for the appellee.

364 **WOODS, J.** The supplemental and amended complaint alleges that at the times therein mentioned, the plaintiff, a corporation, and Herbert Rountree were "partners (or associates in business) under the name of the Greenville Commission Company"; that in November, 1900, the defendants agreed to buy from the plaintiff and Rountree, as such company, eighty bales of goods known as Granger Plaids, at three and three-fourths cents per yard, payable within ten days, the goods to be billed up and held for shipping instructions to be given by the defendants; that thirty bales were ordered out and paid for, and the defendants directed the remaining fifty bales to be billed to Gus Blas Drygoods Company, of Little Rock, Arkansas, but both that company and the defendants have declined to receive the goods or pay for them; that after the contract was made, the market price of the goods declined greatly in value and the sellers, as the Greenville Commission Company, was damaged by the defendants' breach of contract to the amount of five hundred dollars; that since the commencement of the action, Rountree has assigned all his interest in the claim for damages to the plaintiff.

The defendants, in their answer, deny all the allegations of the complaint; allege that the plaintiff, being a corporation **365** could not enter into a copartnership and had no power to contract or be contracted with in that capacity; and allege further, that the contract falls within the statute of frauds, being for the sale of merchandise at a greater price than fifty dollars, and not evidenced by any note or memorandum in writing, signed by the parties to be charged or their agents.

At the trial, the defendants demurred orally on "the ground that it (the complaint) does not state facts sufficient to constitute a cause of action, in that the plaintiff sues as assignee of the Greenville Commission Company, an alleged partnership existing between the Huguenot Mills, a corporation chartered under the laws of the state of South Carolina, and one Herbert Rountree, and under the charter of the Huguenot Mills and the law, a partnership cannot exist between the said Hugue-

not Mills and the said Herbert Rountree, and the alleged contract was, therefore, *ultra vires*."

In the first exception the defendants allege that the circuit judge erred in overruling the demurrer.

The general proposition is well established that a corporation cannot enter into a valid partnership agreement. This implies that such an agreement made by the corporation, even with the assent of all the stockholders, may be annulled at the instance of the state; it implies that an agreement made by the officers may be annulled or disregarded by the stockholders, and that the officers who embark the corporate funds in such an enterprise would be liable for losses resulting to the corporation as for a breach of trust; it implies that the stockholders could require the officers to take a conveyance from the corporation of its interest in property acquired by an attempted partnership of this kind and restore the funds used in its purchase. But it does not imply that the corporation does not acquire, as against the outside world, part ownership of property bought in part with corporate funds in the progress of an attempted partnership business. An incident of ownership is the power of sale, and the power to sell implies the power to hold those ~~see~~ who agree to buy to perform their agreement or pay damages for its breach.

To illustrate: it cannot be doubted, if, in this instance, the stockholders had brought an action to have the business closed up as *ultra vires*, the court would have ordered the assets sold and the contracts for purchases from the concern enforced by suit for the benefit of the corporation. To such suits it would have been idle for those who had purchased or contracted to purchase to deny the corporate right to own and sell the goods.

If this were a suit in a partnership name, the defendants' demurrer would stand on a very different foundation, for the question would then be whether the joint owners could recover when they had sold as an alleged partnership. Even then we think the defendants could not deny the validity of their obligation on that ground: 5 Thompson on Corporations, sec. 5838; Connolly v. Union etc. Pipe Co., 184 U. S. 544, 22 Sup. Ct. Rep. 431, 46 L. ed. 679; Bank of South Carolina v. Hammond, 1 Rich. 288; French v. Donahue, 29 Minn. 111, 12 N. W. 354.

In the case really presented the corporation sues alone in its own right and as assignee of Rountree. The defendants are charged with knowledge that the plaintiff could not enter into a legal partnership (Pearce v. Madison R. R. Co., 21 How.

(U. S.) 441, 16 L. ed. 184), and that in the contract to purchase they were dealing with the plaintiff and Rountree as joint owners of the property, who as such had a right to sell it. For this reason they cannot now dispute the validity of the contract of purchase or the liabilities which fell upon them when they repudiated it. The demurrer was, therefore, properly overruled.

Substantially the same question was made by a motion for nonsuit and in requests to charge. It follows that the first exception as to the demurrer, the first exception as to the refusal to grant a nonsuit, and the first, second, fourth and fifth exceptions to the charge, cannot be sustained.

The defendants' next position is that the motion for nonsuit should have been granted, because the testimony showed that there had been an actual sale and symbolical delivery, ³⁶⁷ and, therefore, the plaintiff, holding the goods only as bailee for the defendants, could not sue for damages for breach of the contract, but only for the price the purchasers agreed to pay. The complaint is for breach of an executory agreement to purchase. It is true that Rountree testifies he regarded the goods as belonging to the defendants as soon as he made the contract of sale, but his mere opinion can have no weight in fixing the nature of the contract. It is perfectly clear from the letters of buyer and seller that the specific patterns and the particular pieces were not fixed by the contract of sale, but were to be selected from the samples by the customer of the purchaser, and after such selection were to be taken from the warehouse stock and shipped to such customer. The contract, if any, was, therefore, executory: 24 Am. & Eng. Ency. of Law, 1054. Hence, when the purchaser refused to receive, the seller could retain the goods and sue for damages: 24 Am. & Eng. Ency. of Law, 1113; *Millar v. Hilliard, Cheves*, 153.

This being an executory contract, and the seller having a right to retain the goods and account for the market price at the time of the breach by the purchaser, the seller was under no obligation to actually resell. He did not resell at the time of the breach and is not claiming damages for the difference between the price obtained at a resale and the contract price, but for the difference between the contract price and the market price at the date of refusal. The law as to resale, therefore, has no application.

The measure of the seller's damages for breach of an executory contract for the sale of goods is the difference between the contract price and the market price at the time the goods ought

to have been accepted by the purchaser: *Stack v. Railroad Co.*, 10 S. C. 97; *Millar v. Hilliard, Cheves*, 153.

The reason for applying this measure of damage is that the seller has the right to put the goods on the market after the contract is broken, and obtain the market price: 2 Benjamin on Sales, sec. 1117. But he cannot sell until the date for acceptance has passed, because until that time the purchaser ²⁶⁸ has the right to take the goods. By the same reasoning, where the exact time for delivery is to be afterward fixed by the purchasers, the measure of damages is the difference between the contract price and the market value at the date of refusal to receive; for such refusal necessarily implies a refusal to fix a time, and there is then a complete breach of the contract. In refusing the nonsuit, and in charging as to the measure of damages, the circuit judge took the correct view of the law on the subject.

The evidence as to the difference between the contract price and the market value at the date of purchaser's refusal to accept might well have been more definite, but it was sufficient to sustain a verdict. Rountree testified: "The market weakened immediately after I made the sale, and continued to decline. It went down from four cents to three and three-eighths, went down as low as three cents. The day I made the trade with George F. Jempson & Co., it was four cents." The defendants offered no testimony to rebut this statement, and we think the jury could well infer that the witness meant the decline to three cents took place immediately after the contract of sale. There was, therefore, no error of law in refusing the motion for a new trial.

The executory contract was evidenced not only by the conversation between Jempson and Rountree, but by the letter of Jempson, written in response to the bill sent to Jempson & Co. by the Greenville Commission Company. The contract is, therefore, not obnoxious to the statute of frauds. It is true, the letters were signed G. F. Jempson and not George F. Jempson & Co., but it was competent to show by parol that Jempson was acting for the firm in signing the letters: *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776; *Benjamin on Sales*, p. 252. The issue as to whether he was acting for himself or the firm of Jempson & Co. in making the contract was fairly submitted to the jury.

There was no error in excluding the testimony of George F. Jempson as to his private arrangements with the ²⁶⁹ Gus Blas Drygoods Company and other customers, of which the plaintiff had no notice.

George F. Jempson, as one of the partners of Jempson & Co., was empowered to contract for the firm; the question was whether he so acted in this matter as to justify the sellers in believing they were contracting with the firm. If he did, the partnership would be bound. The controlling inquiry is, what intention did Jempson express to the sellers by words and acts, not what his unexpressed will was. The fact that as an individual, separate from his partnership relation, Jempson was a purchasing agent for others, might have some bearing in ascertaining whether he, in his inner consciousness, had an intention to contract for the firm or as an individual purchasing agent; but there being no evidence that the sellers knew he ever acted in the latter capacity, proof that he did so act could have no effect in ascertaining whether the sellers had a right to infer from his words and acts that he intended to contract for the firm of which he was a member.

All the exceptions are overruled, and the judgment of the circuit court affirmed.

The Measure of Damages, on the breach of an executory contract of sale by the vendee refusing to receive the goods, is ordinarily the difference between the contract price and the market value at the time and place of the breach: *Funke v. Allen*, 54 Neb. 407, 69 Am. St. Rep. 716; *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297; *Unexcelled Fireworks Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788.

The Statute of Frauds may be satisfied by correspondence or letters between the parties to the contract: *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614; *Austin v. Davis*, 128 Ind. 472, 25 Am. St. Rep. 456; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800.

Parol Evidence is admissible to identify the person or thing mentioned in a written instrument: *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529; *Henderson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529. See, too, *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731.

ELLIS & COMPANY v. CARROLL.

[68 S. C. 376, 47 S. E. 679.]

STATUTE OF FRAUDS.—Promise to Pay the Debt of Another based upon forbearance to enforce immediately some subsisting lien is not within the statute of frauds if the release is a damage to the creditor, or a benefit to the person promised for. (p. 680.)

Butler & Osborne, for the appellant.

N. W. Hardin, for the appellee.

³⁷⁶ JONES, J. J. B. Carroll, son of defendant, was indebted to the plaintiffs in the sum of sixty-five dollars and forty-one cents, which was not denied. On the twenty-sixth day of July, 1902, at Grover, North Carolina, the plaintiffs caused two mules and a wagon to be seized ³⁷⁷ under a valid attachment as the property of J. B. Carroll. The defendant, who was at Grover, North Carolina, at the time, went to plaintiffs and told them that if they would release the property of J. B. Carroll that he would pay the debt. Pursuant to that agreement and on account of the promise made by the defendant, the property was released from attachment. Two or three days afterward, the defendant took the property back to plaintiffs and asked them to release him from the promise, which they refused to do. The defendant claimed that he had been informed that the property belonged to the wife of J. B. Carroll. Defendant and his son, J. B. Carroll, reside in Cherokee county, South Carolina, about one-quarter of a mile from each other, and J. B. Carroll was at the time, and had been for a number of years, working the lands of his father.

This action was brought before Magistrate A. M. Bridges, in Cherokee county, to recover of defendant upon his promise. Defendant plead the statute of frauds. The magistrate gave judgment against the defendant. With respect to the ownership of the attached property, the magistrate held that the testimony was conflicting, but that the attachment created such a lien upon the property of J. B. Carroll that its release on the express promise of the defendant to pay the debt lessened the chances of plaintiffs' collecting their debt, if it did not defeat the same.

On appeal to the circuit court, one of the exceptions taken was that the magistrate erred in not holding that the property attached did not belong to J. B. Carroll, but to his wife, and that

the alleged agreement of defendant to pay J. B. Carroll's debt was nudum pactum, and the other was that he erred in not holding that the agreement was within the statute of frauds. The circuit court overruled both exceptions. Therefore, the circuit court has found as matter of fact that plaintiffs had a valid and enforceable lien on the property of J. B. Carroll by reason of the attachment, which was released upon defendant's promise to pay. "Where one has a complete and enforceable lien on the property of ³⁷⁸ his debtor, a promise of a third person to pay the debt on condition that the property under the lien is given up is not within the statute of frauds": Dunlap v. Thorne, 1 Rich. 213; Adkinson v. Barfield, 1 McCord, 574; Barnstine v. Eggart, 3 McCord, 163, 15 Am. Dec. 625.

The case of Boyce v. Owens, 2 McCord, 208, 13 Am. Dec. 711, does not conflict with the foregoing cases, because no lien was given up in that case, the constable having no authority to attach lands. Nor is there any conflict in principle with cases on the line of Robertson v. Hunter, 29 S. C. 9, 6 S. E. 850, which declare that the test in all such cases is whether there is a new consideration moving to the promisor so as to make it an original and not a collateral promise. While it may well be supposed that the release of the son's mules and wagon, used in farming upon defendant's land, was a benefit to the defendant, yet the cases cited show that it is not controlling that the consideration should be a benefit to the promisor. "If it be a damage to the other party or a benefit to the party promised for, it will be sufficient; provided, these proceed from the forbearance to enforce immediately some subsisting lien."

The judgment of the circuit court is affirmed.

An Agreement to Answer for the Debt of another, when supported by a consideration moving between the newly contracting parties, is not within the statute of frauds: Tindal v. Touchberry, 3 Strob. 177, 49 Am. Dec. 637. See, too, Merrell v. Witherby, 120 Ala. 418, 74 Am. St. Rep. 39; Smith v. Delaney, 64 Conn. 264, 42 Am. St. Rep. 181; monographic note to Packer v. Benton, 95 Am. Dec. 251-263.

Forbearance to Sue as a consideration to support a promise is considered in the note to Prater v. Miller, 60 Am. Dec. 524-527. See as to the effect in general of agreements to forbear to sue, the note to Staver v. Missimer, 36 Am. St. Rep. 145-149.

CASES
IN THE
SUPREME COURT

OF

SOUTH DAKOTA.

ELDER v. HORSESHOE MINING AND MILLING COMPANY.

[15 S. Dak. 124, 87 N. W. 586.]

NOTICE—Publication of—Sufficiency of as to Time.—Publication every day except Sunday in a proper newspaper, beginning Monday, January 7th, and ending Tuesday, April 2d, fulfills the requirement of a statute for giving notice by publication, "for at least once a week for ninety days." (p. 682.)

NOTICE—Publication of Notice "for at least once a week for ninety days" includes the first day of publication. (p. 682.)

NOTICE—Publication of—Time of How Computed.—Under a statute requiring publication of notice "for at least once a week for ninety days," the first and each succeeding publication includes the first day thereof and the six days following, and this must be taken into consideration in computing the required ninety days of publication. (pp. 682, 683.)

F. L. McLaughlin and Martin & Mason, for the appellants.

E. Van Cise, G. C. Moody and C. E. De Land, for the respondents.

¹²⁴ **HANEY, J.** In this action the plaintiffs seek to establish title to an undivided one-half interest in certain mining ground heretofore patented as the North lode, and to compel the defendant, the Horseshoe Mining and Milling Company, to convey such interest. Defendant appealed from a judgment in favor of the plaintiffs, ¹²⁵ which was reversed by this court: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 62 Am. St. Rep. 895, 70 N. W. 1060. The action having been again tried by the court without a jury, judgment was rendered in favor of the defendants, and the plaintiffs appealed.

lication, the delinquent refuses to contribute his proportion or fails to do so, his interest in the claim thereby becomes the property of his co-owners who have made the required expenditures. We perceive no possible harm arising from the fact that the notice itself, containing all the facts necessary to be included therein, was addressed to 'Rufus Wilsey, his heirs, administrators, and to whom it may concern.' The fact that Rufus Wilsey was dead was not material so far as to thereby render the notice to his heirs illegal or insufficient. It certainly did them no harm to include the name of Rufus Wilsey, and the notice was quite as likely to become known to them as if it had been addressed 'to the heirs of Rufus Wilsey, deceased, his administrators, and to all whom it may concern.' It is entirely unlike the publication of a summons for the purpose of commencing an action against a particular individual or individuals. There the identification must be complete and the person particularly described and named, so that when the publication has been finished it can be known that the particular individual has been served with process by publication with the same effect as if it had been personally served on the same individual without publication. This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share, under the penalty of losing his right and title in the property because of such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title, and interest therein. The co-owner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named, and the proper publication of the notice, is sufficient. It did not become insufficient because, in addition to being addressed to them, it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them.

"The supreme court of South Dakota has held in this case that at the time this notice was published the title to a one-half interest in this claim was in the heirs, subject to a possible lien of the administrator for administration purposes, and had been since the death

of Wilsey: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 642; 62 Am. St. Rep. 895, 70 N. W. 1060. The same court has held that an administrator has but a lien on real estate for administrative purposes, and that the title vests in the heirs: Cases cited in opinion of the state court. The only debt, so far as the record shows, existing against the estate of Wilsey, was one for fifty dollars, in favor of Stevens, who was appointed administrator in 1881, and died in 1888, and from then until 1893, there was no administrator, the present one being appointed evidently for the purpose of this suit. The actual title to the fee is in the government (*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 449, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221, 223), but the interest of the miner may be conveyed and inherited. We are of opinion that the publication of the notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish a notice to lienors. We agree with the supreme court of the state that the evident purpose and object of the law of 1872 (section 2324) were to encourage the exploration and development of the mineral lands of the United States, and the sale of the same, and that, all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt.

"There was no irregularity in grouping in one notice claims for more than one year's expenditures. We can perceive no reason why a consolidation of the claims of several years should not be made and included in one and the same notice.

"2. The objection to the sufficiency of the publication of the notice we regard as equally unfounded. The statute provides for a publication 'for at least once a week for ninety days.' The publication was in fact made every day, except Sunday, in the proper newspaper, beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889. And the statute provides that if, after the expiration of ninety days after such notice in writing or publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The publication, we think, was sufficient. The ninety day period begins with the first publication; in this case, Monday January 7th. The publication on that day was sufficient for the week then beginning. The publication on January 15th was sufficient for that week, and, as stated by the supreme court of South

Dakota: 'Each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7th to April 1st, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1st, until the following Monday, April 8th, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6th. Excluding the first day, ninety days ended on Sunday, April 7th. On that day the required notice had continued during ninety days, and another publication on Monday, April 8th, was wholly unnecessary.'

"We are satisfied that this construction is the correct one, and the publication was, therefore, made for a sufficient length of time to comply with the statute.

"The judgment of the supreme court of South Dakota is affirmed."

The Computation of Time is the subject of a monographic note to *State v. Michel*, 78 Am. St. Rep. 372-386. See, also, the subsequent case of *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 79 Am. St. Rep. 565.

STAFFORD v. LEVINGER.

[16 S. Dak. 118, 91 N. W. 462.]

INTOXICATING LIQUORS—Civil Damages.—Under a statute providing that a married woman may maintain a suit on a retail liquor dealer's bond for "all damages sustained by her or her children by reason of the sale of liquor," a widow may recover on such bond for loss of support caused by the death of her husband resulting from a sale of liquor to him. (pp. 690, 691.)

T. D. Wicks and Elliott & Stillwill, for the appellant.

R. Dollard and Kittredge, Winans & Scott, for the respondents.

¹¹⁸ CORSON, J. This is an action by the plaintiff, as widow of George Stafford, deceased, upon a bond given by one Henry Levinger as principal, and the other defendants as sureties, to recover damages sustained by her and her minor daughter in their means of support by the death of the husband and father, as a result of intoxication produced by liquor sold to him by the defendant Levinger. The case was tried to a jury, resulting in a verdict in favor of the plaintiff. Upon motion of the defendants, a new trial was granted, and the order granting the same is in part as follows: "This motion is

granted upon ¹¹⁹ the sole ground that the plaintiff has no right of action, and all other grounds, except that plaintiff cannot recover damages for death in this action, are expressly overruled." It will thus be seen that the only question presented is a legal one, namely, as to whether or not the plaintiff can maintain the action under the statute of this state. The facts are fully set out in the complaint, and may be briefly stated as follows: In December, 1898, the defendant Levinger was engaged in the business of selling intoxicating liquors in the city of Scotland, Bon Homme county, under a license duly issued to him. That said Levinger as principal, and Cach and Plattner as sureties, executed a bond in the form prescribed by statute, and that said bond was duly accepted by the board of county commissioners of Bon Homme county. That in December, 1898, the plaintiff was, and for twenty-five years prior thereto had been, the wife of the said George Stafford. That May Stafford was the minor daughter of said plaintiff and George Stafford, deceased. That on the third day of December, 1898, said George Stafford spent the afternoon and evening of said day in the saloon of said Levinger, and said Levinger, by himself or his servants, sold and furnished to him spirituous liquors, causing his intoxication. That the said George Stafford was then and there a person in the habit of becoming intoxicated, which was well known to the defendant Levinger and to his servants in charge of said place of business. That on the evening of said day George Stafford, deceased, while intoxicated from the effects of the liquor sold to him by the defendant Levinger and his servants, was unable to care for himself and protect himself from danger, and that, starting toward home in a wagon, he was unable to manage his team, by reason of such intoxication, and the wagon ¹²⁰ was overturned upon him, causing his death. That the plaintiff and said minor daughter were dependent upon the deceased for their support, and that the proceeds of his earnings, when alive, amounted to about six hundred dollars per year, which was applied to the support of herself and her said child. That the plaintiff and her said minor daughter constitute one family, and were left by the deceased in indigent circumstances, and entirely without means of support, and that the plaintiff and her said daughter sustained damages in the sum of two thousand dollars, for which she demanded judgment.

It is insisted on the part of the respondents, in support of the order of the court granting the new trial, that the action is

in effect an action to recover damages for the death of the husband, and that such an action is not authorized by the statute of this state or by the common law. The appellant contends that the action is one for damages for the loss of support for herself and minor child, caused by the death of her husband. We are of the opinion that the appellant is right in her contention. Section 16, chapter 72, of the session laws of 1897, provides, among other things, as follows: "The damages in all cases arising under this act, together with the costs of suits, shall be recovered in an action before any court of competent jurisdiction, and in any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but the commencement of suit and recovery by one of said parties shall be a bar to a suit brought by the other. And it shall be lawful for any married woman or any other person at her request to institute and maintain in her own name a suit on any such bond mentioned in this act for all damages sustained by her or by her children on account of such traffic, and the money ¹²¹ when collected shall be paid over for the use of herself and children." By section 6 of the same act it is provided that every person engaging in the sale of any spirituous liquors shall, before commencing such business, execute to the county in which he is carrying on such business a bond conditioned that he shall pay all damages, actual or exemplary, that may be adjudged to any person or persons for injuries inflicted on him or them, either in person or in property, means of support, or otherwise, by reason of his selling, furnishing, giving, or delivering such liquors. By section 11 it is provided that it shall not be lawful for any person to sell spirituous liquors to any intoxicated person, or to any person in the habit of getting intoxicated. It will be observed that by section 16 it is made lawful for any married woman to institute in her own name a suit on the bond for all damages sustained by her or her children on account of the traffic in intoxicating liquors, and the money when collected shall be paid over for the use of herself and children. The language, it will be noticed, is very broad, being all damages sustained by her or her children "on account of such traffic." The jury must have found that the death of the deceased was caused by intoxication, and that the liquor causing such intoxication was furnished by the defendant Levinger at his saloon. The action, in our opinion, is not for damages for the death of the deceased, but is strictly for the loss of support by the wife and daughter by reason of the death of the

husband. It is quite clear from the act of the legislature that it was the intention of the law-making power to protect the wives and children of persons who might become intoxicated, by requiring the saloon-keeper to make good any loss to her or them, to the extent of two thousand dollars, occasioned by the intoxication of the husband.

¹²³ As will be observed from the language of section 11, it is declared to be unlawful for the saloon-keeper to sell or furnish intoxicating liquors to one accustomed to getting intoxicated, or to one who is intoxicated. It is further declared by that section that selling or furnishing intoxicating liquors to such a person shall be prima facie evidence of intent on the part of the person so selling to violate the law. When, therefore, the saloon-keeper sells or furnishes intoxicating liquors to a person accustomed to becoming intoxicated or who is intoxicated, he is violating the law, and is not protected by his license; and the law-making power evidently intended to require the person so violating the law to make good the loss sustained by the parties dependent upon the intoxicated person for their support. And whether that loss is occasioned by the disability or death of the husband or father is not material. This seems to have been the view of the court of appeals of New York in *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386, in which an act quite similar to the one we are considering was before that court for construction, in which they use the following language: "The injury to the means of support was one of the main grounds of the action, and when the party is deprived of the usual means of maintenance which he or she was accustomed to enjoy previously, by or in consequence of the intoxication or the acts of the person intoxicated, the action can be maintained. It is evident that the legislature intended to go in such a case far beyond anything known to common law, and to provide a remedy for injuries occasioned by one who is instrumental in producing or who caused such intoxication. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, ¹²³ according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnish means of intoxication, by making them liable for damages which might arise, which were caused by the parties who furnished such means. If the injury which resulted to the deceased in consequence of

his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would, no doubt, be embraced within the meaning and intent of the statute. That death ensued in consequence thereof furnished much stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress. Such could not have been the intention of the lawmakers and the statute was designed to embrace and most manifestly cover and include all injuries produced by the intoxication, and which legitimately result from the same": *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

It is contended on the part of the respondent that it was not the intention of the legislature to suppress the sale and use of intoxicating liquors, for the reason that the act itself authorizes the sale, and provides for licensing the same. But while this may be so in a general sense, by section 11, as we have seen, every licensed saloon-keeper is prohibited from selling to persons accustomed to becoming intoxicated or who are intoxicated, thus showing clearly that it was the intention of the law-making power to suppress the sale of intoxicating liquors to a class of persons liable to be injured by its sale.

¹²⁴ The supreme court of Illinois, in the case of *Emory v. Addis*, 71 Ill. 273, in speaking of a statute quite similar to our own, uses the following language: "The statute is broad and sweeping in its provisions, but the wrong it is intended to prohibit can only be prevented by the rigid enforcement of highly penal laws. He who deliberately sells that which he knows will inflame the passions, deprive the party of the control of his judgment, and render him for the time being incapable of exercising proper care for personal safety, or that of his property, must be prepared for the consequences that may follow. One risk incident to the traffic is, by the statute, he is made responsible for all the injuries such persons may inflict." And in that case the court held that the widow was entitled to recover for the loss of her means of support by reason of the death of her husband, which was caused by intoxicating liquors sold to him by the defendant: See, also, *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Flynn v. Fogarty*, 106 Ill. 263. The supreme court of Nebraska, in *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715, held, under a similar statute,

that a married woman and her minor children, constituting one family, might recover of the saloon-keeper damages sustained by reason of the death of her husband, caused by intoxicating liquors sold to him by said saloon-keeper, and many actions of that nature have been sustained in that state: *Fitzgerald v. Donohar*, 48 Neb. 852, 67 N. W. 880. The supreme court of Iowa has given their act a similar construction: *Rafferty v. Buckman*, 46 Iowa, 195; *Ward v. Thompson*, 48 Iowa, 588; *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. 882.

Counsel for respondent rely very largely upon the decisions ¹²⁵ of *Schneider v. Hosier*, 21 Ohio St. 98, *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, and *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 465. The reasoning of these learned courts in the cases cited do not meet with our approval, and are not, in our opinion, sustained by the weight of authority. In discussing this question, and reviewing the cases last cited, Mr. Black, in his work on Intoxicating Liquors, uses the following language: "It has been held that, in an action under the civil damage laws, no damages can be awarded to the plaintiff for injury to her means of support by reason of the death of her husband, caused by his intoxication, the consequence of the defendant's furnishing him with liquor. But this doctrine, though supported by the decisions of several eminent courts, cannot be regarded as in accordance either with the weight of authority or the best legal reasoning. The statute gives an action for injury to the plaintiff's means of support. The husband's capacity to labor and to earn a living is the means to which the wife is legally entitled to look for her support. Death deprives him of this capacity. If, then, his death was a consequence of his intoxication, it seems too plain for argument that the person who caused the intoxication has inflicted an injury upon the wife's means of support. And if this is true, it cannot be denied that she is entitled to recover damages—not, indeed, for the death, but for the consequent injury to her means of support. And the majority of the decisions are to the effect that, if these elements are present—the furnishing of liquor by the defendant, the intoxication of the husband, and the latter's death in consequence of such intoxication—the widow may maintain an action for injury to her means of support, and recover damages therefor." This court has virtually passed ¹²⁶ upon the question presented on this appeal in the case of *Nordin v. Kjos*, 13 S. Dak. 497, 83 N. W. 573, although the precise point here presented was not directly involved in that case.

It was assumed, however, that the widow could maintain an action for the loss of support caused by the death of her husband.

These views lead to the conclusion that the learned circuit court was in error in granting a new trial, and the order granting the same is reversed.

*In an Action Under the Civil Damage Acts for an injury to the means of support in consequence of intoxication, a recovery may be had where the intoxication causes the death of the intoxicated person: *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; note to *Mastad v. Swedish Brethren*, 85 Am. St. Rep. 450, 451. Some of the courts, however, seem to have gone astray on this question: See *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456; *Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598.*

PLANO MANUFACTURING COMPANY v. MURPHY.

[16 S. Dak. 380, 92 N. W. 1072.]

SUMMONS—Who may Serve.—The agent of a corporation or other party plaintiff to an action is not a "party," within the meaning of a statute authorizing service of summons by the sheriff or any other person not a party to the action, and such service may therefore be legally made by such agent. (p. 693.)

SUMMONS—Service—Mistake of Law.—An opinion entertained by a defendant that no one but an officer could make a valid service of summons upon him in a civil action is a mistake of law and not of fact, from which the defendant is not entitled to relief, on the ground of his mistake or excusable neglect. (pp. 693, 694.)

J. B. Heuten, for the appellants.

C. A. Harris, for the respondent.

³⁹¹ **CORSON, J.** This is an appeal from an order made by the circuit court of Brown county denying defendant's motion to vacate and set aside a judgment and for leave to answer. The motion seems to have been made upon the following grounds: 1. That the summons in the action was not properly served upon the defendant, as the same was not served by an officer or by a person not a party to the action; 2. That judgment was taken against the defendant through his mistake, inadvertence, surprise, or excusable neglect; 3. That no ³⁹² proper judgment was entered under the complaint in the action; and 4. That the complaint was not properly verified. The action

was commenced in the circuit court of Brown county, and the summons was served on the defendant in Codington county by the collecting agent of the plaintiff. Section 4899 of the Compiled Laws provides: "The summons may be served by the sheriff of the county where the defendant may be found or by any other person not a party to the action." The word "party" was evidently used in this section by the law-making power in its technical sense, and a person, therefore, not strictly a party to the record is competent to serve a summons in a civil action. The fact that E. F. McCoy was the collecting agent of the plaintiff did not disqualify him, and a service made by him therefore was a legal service: *First Nat. Bank v. Estenson*, 68 Minn. 28, 70 N. W. 775; *Loucks v. Hellenbeck*, 48 App. Div. 426, 63 N. Y. Supp. 1. It appears from the affidavits that E. F. McCoy, as the agent of the plaintiff, had a conversation with the defendant regarding the payment of certain notes guaranteed by him and the other members of the firm, and that not being able to effect a settlement, McCoy then served or attempted to serve the defendant with a summons in this action. It is not necessary to set out the affidavits of the various parties in detail, it being sufficient to state that the said E. F. McCoy handed to the defendant a copy of the summons, which the defendant refused to receive, and the same was left by him lying upon the table of the Kampeska House at Watertown. The only reason given by the defendant in his affidavit for not receiving the summons was that he entertained the opinion that no one but an officer could serve a summons in an action. The defendant does not claim that any fraud was practiced upon him, ³⁸³ and no mistake, inadvertence, surprise or excusable neglect, such as the law contemplates, is shown. The only mistake for which relief will be granted is a mistake of fact: 6 Ency. of Pl. & Pr. 167; *Shearman v. Jorgensen*, 106 Cal. 484, 39 Pac. 863; *City of New York v. Green*, 1 Hilt. 393; *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118. The opinion entertained by the defendant that no one but an officer could serve a summons upon him in a civil action was a mistake of law, and not of fact. The case of *Griswold etc. Oil Co. v. Lee*, 1 S. Dak. 531, 36 Am. St. Rep. 761, 47 N. W. 955, relied upon by appellant, does not sustain his contention. There are some facts in that case stated by the defendant Lee in his affidavit showing mistake and excusable neglect which served to call into exercise the discretionary power of the trial court. But in the case at bar we fail to discover any mistake, inadvertence,

surprise or excusable neglect. We are of the opinion, therefore, that the trial court committed no error in denying the defendant's motion. The other points made have not been overlooked, but, in our view, they are without merit.

The order of the circuit court is affirmed.

An Agent of the Plaintiff is not within the inhibition of a statute which precludes the plaintiff himself from serving a summons: *Loucks v. Hallenbeck*, 63 N. Y. Supp. 1, 48 App. Div. 426. And under a statute providing that "the summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action," the attorney of the plaintiff may serve a summons: *First Nat. Bank v. Estenson*, 68 Minn. 28, 70 N. W. 775. "The contention of the appellant," said the court, "is that this statutory prohibition by necessary implication includes the agent and attorney of the party, because a party cannot do by another what he himself is prohibited from doing. This is plausible, but carried to its legal conclusion it would extend the statute so as to prohibit the service of a summons by any other person than the sheriff, because if the plaintiff contracts with or procures a private person to serve his summons, such person is necessarily his agent or attorney." In *Rutherford v. Moody*, 59 Ark. 328, 27 S. W. 230, however, the service of a summons by the plaintiff is held bad. Said the court: "The service of process should be made by an indifferent person, and not by a party, or one interested in the suit as attorney or otherwise," citing *Weeks on Attorneys*, sec. 122; *White v. Hoffaker*, 27 Ill. 349; *Ingraham v. Leland*, 19 Vt. 304.

HARDING v. HARDING.

[16 S. Dak. 406, 92 N. W. 1080.]

DIVORCE—Alimony—Lien on Homestead.—Under a statute providing that if divorce is granted for the fault of the husband, the court may allow to the wife such alimony as it may deem just, and may, from time to time, modify its orders in this respect, and enforce the payment of such allowance by a receiver, and may assign the homestead to the innocent person, the court may modify its original decree for alimony, in which no mention is made of the homestead, upon default in payment by the husband, so as to require him to pay a fixed sum, and may make it a lien upon the homestead in his possession. (p. 699.)

DIVORCE—Alimony—Sale of Homestead to Satisfy—Right to Redeem.—Although the court is vested with power to declare alimony awarded the wife upon divorce a lien upon the husband's homestead, it exceeds its power and jurisdiction when it decrees that such homestead shall be immediately sold to satisfy such decree for alimony, and that the property shall be immediately delivered upon such sale to the purchaser, when the statute provides that the judgment creditor upon sale of his property under execution shall have one year in which to redeem therefrom. (p. 699.)

DIVORCE—Alimony—Sale of Homestead—Voidable Decree—Right to Redeem.—A decree that the homestead of a divorced husband be immediately sold to satisfy a decree for alimony against him, and that the possession of the property shall be immediately delivered upon such sale to the purchaser, is voidable as depriving such husband of his statutory right to redeem his property from sale under execution. (pp. 699, 700.)

W. G. Rice and W. H. Parker, for the appellant.

Frawley & Laffey, for the respondent.

406 CORSON, J. On the third day of January, 1898, the circuit court of Lawrence county entered a judgment in favor of the plaintiff, granting her a divorce from the defendant, and in the decree it was provided that the defendant pay plaintiff's attorney ⁴⁰⁷ fee, amounting to one hundred dollars, and thirty-five dollars per month alimony, payments to be made monthly on the tenth day of each calendar month. It was alleged in the complaint, and found by the court, that the husband and wife were possessed of a homestead in the first ward of Deadwood, of about the value of two thousand dollars, but in the decree no mention is made of the same. The defendant having failed to make the payments specified in the decree, the plaintiff filed her petition praying for a modification of the decree, and, upon the hearing of the same, the court, on the twenty-ninth day of January, 1900, made an amended decree, the material parts of which are as follows: "Ordered, adjudged and decreed that the judgment of the court entered herein on the third day of January, 1898, be, and the same hereby is, modified in reference to the payment of alimony only, in this: that the plaintiff take, and the defendant pay, the sum of five hundred dollars in full of permanent alimony herein, and that the real estate hereinbefore described, owned by the defendant, be sold as provided by law for the sale of real estate, and that out of the proceeds derived therefrom the plaintiff be paid the sum of five hundred dollars; and the sheriff of Lawrence county, South Dakota, is hereby appointed by the court as commissioner to make such sale, and he is authorized and empowered to sell said real estate under this decree in the manner provided by law for the sale of real estate on execution, and a certified copy of this decree, issued out of the clerk's office, shall be his authority for the making of such sale; and, out of the proceeds derived from such sale, the costs shall be paid first, then the sum of five hundred dollars to the plaintiff herein, and the remainder, if any, shall be paid to the defend-

ant; and said commissioner is directed to make a return to this court of his proceedings hereunder, and to make ⁴⁰⁸ and execute to the purchaser or purchasers at such sale a deed of the premises so directed to be sold, upon his receiving the purchasing price therefor, which deed, on confirmation of the sale by this court, shall pass and convey to such purchaser or purchasers all the right, title, and interest of the plaintiff and defendant in this action at the date of this decree, or at any time subsequent thereto. The purchaser or purchasers at such sale shall be let into immediate possession and occupancy of said premises so sold, and the sheriff of said county, so appointed as aforesaid, is authorized and directed to deliver the possession of the premises sold to such purchaser or purchasers. Done in open court this twenty-ninth day of January, 1900." From this part of the amended decree the defendant has appealed to this court.

It is contended on the part of the appellant: 1. That as the homestead is not referred to in the former decree, the court had no jurisdiction by an amendment to subject the homestead to the payment of alimony; 2. That the court had no authority to decree that the possession of the property, when sold, should be immediately delivered to the purchaser; 3. That the court had no authority to deprive the party of his right of redemption by directing that a deed should be executed to the premises upon the confirmation of the sale, and decreeing that the said deed should convey to the said purchaser or purchasers all of the right, title and interest of the plaintiff and defendant in this action, at the date of the decree. The court, in amending the decree in this case, evidently proceeded under the provisions of section 2584 of the Compiled Laws, which reads as follows: "Where a divorce is granted for an offense of the husband, the court may compel him to provide ⁴⁰⁹ for the maintenance of the children of the marriage, and to make such allowance to the wife for her support during her life or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." This court, in construing that section in *Greenleaf v. Greenleaf*, 6 S. Dak. 348, 61 N. W. 42, uses the following language: "As will be observed, under the provisions of these sections the court is vested with full power to modify its decree and orders relating to alimony, or allowance to minor children. These provisions of the statute were evidently adopted for the purpose

of enabling the court to make such modifications or changes in its decree or orders relating to alimony, or the support or maintenance of minor children, from time to time, as the circumstances of the parties might require, and they should therefore receive a liberal construction in furtherance of justice." Section 2585 provides as follows: "The court may require the husband to give reasonable security for providing maintenance, or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case. The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads." The court, being empowered to place the property of the defendant in the hands of a receiver in order to enforce the payment of alimony, and having the power to assign the homestead to the innocent party either absolutely or for a limited period, would necessarily have the power to ⁴¹⁰ order the homestead sold in order to enforce the payment of alimony decreed to the wife, and the power vested in the court to enable it to render the original judgment remains vested in it, under the provisions of the statute enabling it to render an amended judgment which the circumstances of the case may require. The evident purpose and object of the legislature, in adopting these various provisions, was to give the court full power and authority to enter such judgment, and, upon a proper showing, to modify the same in such manner as the exigencies of the case might require. The present case presents a striking example of the necessity of such a power in the courts. The original judgment provided for the payment of thirty-five dollars per month alimony by the defendant, but no payments, except the sum of twenty-five dollars, were made. The defendant had been left in the possession of the homestead, on the theory, no doubt, that he would pay the alimony prescribed by the judgment promptly. Two remedies were then open to the court. One was to punish the defendant as for contempt, and the other was to modify the judgment so as to enforce the sale of the homestead property. The court adopted the latter remedy. The case of *Blake v. Blake*, 75 Wis. 339, 43 N. W. 144, is quite analogous to the case at bar. In that case, the original decree was merely for alimony, but it was held that it might be so modified as to make a full disposition of the husband's property. The section of the Wisconsin stat-

ute under which the court acted is quite similar to section 2584 of our own statute. The court in that case says: "It is further claimed that as the original judgment was simply for alimony, the power of the court in any subsequent adjudication was limited by statute to a mere modification as to the amount of such alimony, and ⁴¹¹ hence could not, by way of modification, extend to a final division of the defendant's property. This contention is conceded to be in conflict with the reasoning of Ryan, C. J., in *Campbell v. Campbell*, 37 Wis. 206. In that case it was in effect said that all the estate and income of the husband, whenever and however acquired, actually possessed and enjoyed by him at the time of a subsequent judgment for alimony, or a subsequent judgment for division of estate, is subject to such subsequent judgment: *Campbell v. Campbell*, 37 Wis. 219. We are not aware that this doctrine has ever been questioned by this court." And the court, in that case, held that the circuit court had power to modify its former judgment and divide the estate. In *Blankenship v. Blankenship*, 19 Kan. 159, the supreme court of Kansas says: "The power to take the homestead from the husband, and assign the same to the wife, is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same sold to discharge the lien. The greater power includes the less; and we find no error as to the sale of the homestead, it appearing from the record that the plaintiff in error was possessed of this identical property at the rendition of the judgment": *Southworth v. Treadwell*, 168 Mass. 511, 47 N. E. 93; *Graves v. Graves*, 108 Mass. 314; *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153; *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609; *Foster v. Foster*, 56 Vt. 540. Again, in *Gaston v. Gaston*, supra, the supreme court of California held that, independently of the statute, a court of equity possessed the power to decree that the alimony awarded shall be a lien upon the defendant's real estate, including his homestead. That court, after quoting the provisions of the statute, which seems to be practically ⁴¹² the same as ours, use the following language: "Appellant claims that the effect of this section is to render void the portion of the judgment imposing a lien on his land; that the power of the court was limited to exacting security from him. We think the law is otherwise. With us, an action for divorce is treated as a case in equity (*Wadsworth v. Wadsworth*, 81 Cal. 187, 15 Am. St. Rep. 38, 22 Pac. 648), and the statute ought not to be construed as abridg-

ing the power exercised by courts having cognizance of matrimonial causes—commonly, though not always, as a branch of their chancery jurisdiction—to declare a lien for securing the award of support to the wife in such cases. Said the supreme court of Ohio, of a judgment like the present, except that it omitted the provisions for a lien: ‘That it is within the legitimate power of the court to make such decree a charge upon real estate we have no doubt, and it has been the practice so to do in cases where it is deemed proper’: *Olin v. Hungerford*, 10 Ohio, 268. And such is the current authority, with but little dissent: *Wightman v. Wightman*, 45 Ill. 167; *O’Callaghan v. O’Callaghan*, 69 Ill. 552; *Holmes v. Holmes*, 29 N. J. Eq. 9, 12. Many other cases are collected in the reporter’s note to *Stoy v. Stoy*, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625.” The appellant relies upon the case of *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083, decided by this court, but the law as laid down in that case does not in any manner control the case at bar. In the decree of divorce in that case no mention was made of the homestead, and there was no amended decree. Clearly, in such a case, the divorced wife would have no interest in the homestead after the decree of divorce. We are clearly of the opinion that, both under the liberal provisions of our statute ⁴¹³ and the general powers invested in courts of equity, it was perfectly competent for the circuit court to so far modify the original judgment as to make the alimony a lien upon the homestead in the possession of the defendant.

The second contention of the appellant is that the court had no authority to hold that the possession of the property when sold should be immediately delivered to the purchaser. We are inclined to the view that the appellant is right in his contention. While the court is vested with power to declare the alimony awarded a lien upon the defendant’s real estate and homestead, we are of the opinion that it extends no further, and that the court, in decreeing that the possession of the property should be immediately delivered upon sale to the purchaser, exceeded its powers in the premises. Our statute (section 5151 to 5154) provides that the judgment debtor, in the case of sale of his property on execution, shall have one year in which to redeem the same, and this court has held that during the year the possession of the judgment debtor cannot be disturbed: *Wood v. Conrad*, 2 S. Dak. 405, 50 N. W. 903.

The same principle applies to the third contention of appellant that the defendant cannot be deprived of his right to re-

deem the property from sale. We are also inclined to agree with the counsel for appellant in this contention. The question of the redemption and possession of the property during the year of redemption has been provided for by statute, and the court does not possess the power to abridge these rights in the absence of some special power granted by the legislature. The amended judgment of the court below must, therefore, be modified by striking therefrom the clause decreeing that the sheriff shall deliver immediate possession of the property to ⁴¹⁴ the purchaser, and the clause declaring that such deed shall vest an absolute title in the purchaser: *Dufrene v. Johnson*, 60 Neb. 18, 82 N. W. 107.

The judgment, as modified, is affirmed. Inasmuch as there has been a modification of the judgment, neither party will recover costs against the other on this appeal, but the appellant will pay the clerk's costs.

**POWER OF COURTS TO CREATE AND ENFORCE LIENS TO
SECURE THE PAYMENT OF ALIMONY.**

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I. Nature of Alimony.

The nature of alimony has been variously defined. It has been said to be that allowance made to a woman on a decree of divorce, for her support out of the estate of her husband: *Adams v. Storey*, 135 Ill. 448, 25 Am. St. Rep. 392, 26 N. E. 582; *Parsons v. Parsons*, 9

N. H. 309, 32 Am. Dec. 362. In *Russell v. Russell*, 4 Greene (Iowa), 26, 61 Am. Dec. 112, it was said to be an allowance for the maintenance of the wife. While in a later case (*Daniels v. Lindly*, 44 Iowa, 569), the court said: "The claim of the wife for alimony is not in the nature of a debt. She is not the creditor of the husband. It is an equitable allowance made to her out of her husband's estate." In *State v. Kink*, 49 La. Ann. 1503, 22 South. 887, the court said: "An order for alimony in a divorce suit is nothing more than the judicial sanction and enforcement under abnormal conditions, through the judiciary, of the duty by the husband to support his wife." In a very late case in Illinois, that of *Rush v. Flood*, 105 Ill. App. 182, it was held that alimony is an allowance to a wife by order of court on account of her, without her fault, living separate and apart from her husband, but an order to pay for the support of children is not an award of alimony. It has sometimes been held that a decree for alimony is not terminated by the death of the party who is to pay it: *Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417, 18 N. E. 329; *Murphy v. Moyle*, 17 Utah, 113, 70 Am. St. Rep. 767, 53 Pac. 1010; though the contrary has also been held: *Gaines v. Gaines*, 9 B. Mon. 295, 48 Am. Dec. 425; *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. Dec. 52. As bearing on this subject, see *Pearson v. Darrington*, 32 Ala. 254; *Lennahan v. O'Keefe*, 107 Ill. 620; *O'Hagan v. O'Hagan*, 4 Iowa, 509; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717; *Shafer v. Shafer*, 30 Mich. 163; *Deweese v. Deweese*, 55 Miss. 315; *Field v. Field*, 15 Abb. N. C. 434; *Beach v. Beach*, 29 Hun, 181; *Swan v. Harrison*, 2 Cold. 534; *Francis v. Francis*, 31 Gratt. 283; *Stones v. Cook*, 7 Sim. (Eng.) 22, 8 Sim. 321. It seems to us, that in the consideration of this subject some of the courts fail to consider the inchoate right of the wife to dower in the lands of the husband, where dower has not been abolished, and place her right to alimony solely upon the husband's duty to support his wife, whereas it seems to us that the right to alimony should be based on both the obligation of the husband and the right of the wife to an interest in the husband's estate. The court in *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153, differentiated the various kinds of alimony. It said: "It is to be noted that there is a marked distinction between permanent alimony decreed upon a dissolution of the marriage relation, and either an allowance pendente lite or temporary alimony, or alimony allowed upon a divorce a mensa et thoro, or an allowance under our statute of separate maintenance. In respect to alimony of the several kinds last mentioned the parties stand before the court and in relation to each other as husband and wife, but in respect to alimony allowed after divorce from the bonds of matrimony they stand before the court and in regard to each other upon such footing as that the legal liability of the divorced husband for alimony is in the nature of an obligation or duty to a stranger."

II. Nature of Decree for Alimony.

The decisions of the courts are not entirely uniform as to the nature or status of a decree or judgment for alimony. Probably the majority of the courts regard a judgment for alimony as a debt of record in the same manner as any other judgment for money: *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 817, 62 Pac. 125, 54 L. R. A. 204. In *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. 169, 33 L. R. A. 708, it was held that a judgment for alimony in favor of a woman makes her a judgment creditor of her former husband, and as such she is entitled to avail herself of all the remedies given by the statute to judgment creditors. It has frequently been held that a decree for alimony has the same force and effect as a judgment at law: *Coulter v. Lumpkin*, 94 Ga. 225, 21 S. E. 461; *Sapp v. Wightman*, 103 Ill. 150; *Frakes v. Brown*, 2 Blackf. 295; *Tyler v. Tyler*, 99 Ky. 31, 34 S. W. 898; *Dufrene v. Johnson*, 60 Neb. 18, 82 N. W. 107. Though a decree of divorce is regarded as a judgment in rem rather than in personam, still in so far as it decrees alimony and costs it is regarded as in personam: See the monographic note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182-184. In *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 S. W. 391, it was said that if a decree awarding alimony has the effect of a judgment at law in the state wherein it was entered, an action at law may be maintained on it in another state. Because of the fact that a decree for alimony is often allowed to be subsequently modified on account of changed circumstances, it is sometimes urged that such decrees are not final judgments. Thus it has been held that an alimony decree is not such a debt which can be discharged in bankruptcy: *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; *Welty v. Welty*, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161; *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735, 45 L. ed. 1009; though the contrary was held in *Arrington v. Arrington*, 131 N. C. 143, 92 Am. St. Rep. 769, 42 S. E. 554. The courts have also quite frequently held that a decree for alimony is not a debt within the meaning of the constitutional provision, prohibiting imprisonment for debt: *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; *State v. King*, 49 La. Ann. 1503, 22 South. 887; *In re Cave*, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425. In *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, 48 L. R. A. 679, it was held that a foreign decree for the future payment of alimony which remains subject to the discretion of the foreign court lacks that conclusiveness of character requisite for enforcement by the courts of another state.

III. Power of Court to Decree a Lien.

a. In Suits for Absolute Divorce.

1. **As to Personal Property.**—Although alimony awarded in a divorce suit may, as a general rule, be decreed a lien upon real estate, the courts refuse to declare it a lien upon the personal property of the party against whom the decree is entered: *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 113, 43 Pac. 130; *Griswold v. Griswold*, 111 Ill. App. 269. In *Yelton v. Handley*, 28 Ill. App. 640, it was sought to sustain a lien on personalty for alimony under a code provision declaring that every decree for money shall be a lien "on the lands and tenements of the party against whom it is entered," but the court refused to allow the lien. And in *Conklin v. Conklin* (Minn.), 101 N. W. 70, it was held that the court was not authorized under a statute allowing alimony to make a specific lien upon specified parcels of land, to decree the amount of alimony as a specific lien upon personal property.

2. As to Real Property.

A. General Rule.

1. **As to Temporary Alimony.**—The decisions with respect to attempts to make temporary alimony a lien on the real estate of the party who is to pay the alimony do not seem to be numerous. In *Barnes v. Barnes*, 59 Iowa, 456, 13 N. W. 441, an order allowing a certain sum as temporary alimony for payment of attorneys' fees was permitted to stand, but the lien therefor upon the homestead was not allowed. And in *Grove's Appeal*, 68 Pa. St. 143, it was held that an order pendente lite for the wife's support and expenses was not a judgment upon which execution could issue, nor did it create a lien, nor could it be regarded as "a decree in equity for the payment of money."

2. As to Permanent Alimony.

a. **In General.**—It may be stated as supported by the weight of authority that courts have the power to declare a lien upon the real estate of the person against whom the decree is directed in order to secure the payment of the alimony awarded: *Gaston v. Gaston*, 114 Cal. 546, 55 Am. St. Rep. 86, 46 Pac. 609; *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. 885; *Hall v. Harrington*, 7 Colo. App. 474, 44 Pac. 365; *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 113, 43 Pac. 130; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Frakes v. Brown*, 2 Blackf. 295; *Harshberger v. Harshberger*, 26 Iowa, 503; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Lawton's Petition*, 12 R. I. 210; *Min Young v. Min Young*, 47 Ohio St. 501, 25 N. E. 168; *Gardenhire v. Gardenhire*, 2 Okla. 484, 37 Pac. 813; *Harding v. Harding*, 16 S. Dak. 406, ante, p. 694, 92 N. W. 1080. In *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 684, 35 N. E. 58, it was held that an alimony decree for a gross sum would per se operate as a lien like any other

judgment for money. The court, after reviewing *Lockwood v. Krum*, 34 Ohio St. 1, *Chase v. Chase*, 105 Mass. 385, and *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. ed. 226, said: "And if the duty of the husband to provide proper maintenance and support for his wife, before and after a decree of divorce, is not technically a debt, it is, nevertheless, a paramount obligation springing out of a sacred relation, which, when it has passed into judgment, should, as such, carry with it the well-known binding force that attaches to judgments at law." It has quite frequently been held that such alimony decrees, where for a fixed sum of money, are liens on the real estate of the husband in the same manner as any other money judgment: *Coulter v. Lumpkin*, 94 Ga. 225, 21 S. E. 461; *Sapp v. Wightman*, 103 Ill. 150; *Frakes v. Brown*, 2 Blackf. 295; *Tyler v. Tyler*, 99 Ky. 31, 34 S. W. 898; *Dufrene v. Johnson*, 60 Neb. 18, 82 N. W. 107; *Keyes v. Scanlan*, 63 Wis. 345, 23 N. W. 570. In *Russell v. Russell*, 4 Greene (Iowa), 26, 61 Am. Dec. 112, an early case, the court said: "We find no authority in a case of this kind for transferring the real estate of the husband in fee simple to the wife, independent of the consent of the husband, by the act of the court. The most that will be done judicially is to give the wife a lien on the real estate of the husband for the amount of alimony decreed." In *Questel v. Questel*, *Wright* (Ohio), 492, a receiver was appointed to receive the rents and profits from the property in order to secure the payment of the alimony awarded. In *Burrows v. Purple*, 107 Mass. 428, the decree for alimony was enforced by an order "that execution issue therefor." And in *Sapp v. Wightman*, 103 Ill. 159, it was said the fact that the alimony was decreed to be in satisfaction of dower makes no difference as to the lien of the decree. A few of the earlier cases refused to allow such liens in the absence of statutory authority. Thus, in *Perkins v. Perkins*, 16 Mich. 162, it was held that a court of equity had no original power to create liens on real estate and had no general power under the Compiled Laws to declare alimony to be a specific charge upon lands or to direct such lands to be sold in default of payment. So, also, in *Casteel v. Casteel*, 38 Ark. 477, it was held that alimony should not be declared a lien on the husband's lands because it embarrassed alienation, but in *Kurtz v. Kurtz*, 38 Ark. 119, the same court, in speaking of an alimony decree, observed that "as for all sums ordered to be paid at once, and for which execution may issue, they are already general liens without being so expressed." Decrees making alimony a lien on defendant's real estate were held erroneous in *Swansen v. Swansen*, 12 Neb. 210, 10 N. W. 713, and *Brotherton v. Brotherton*, 14 Neb. 186, 15 N. W. 347; though later on in *Dufrene v. Johnson*, 60 Neb. 18, 82 N. W. 107, it was held that such decrees, when for a definite sum, had the same force and effect as other money judgments.

b. *When Payable in Installments.*—In *Stoy v. Stoy*, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625, it was held that alimony which accrues

after the docketing of the decree allowing it becomes a lien on the lands of the defendant as fast as it becomes due. In *Kurtz v. Kurtz*, 38 Ark. 119, the court observed that the embarrassment and inconvenience incurred by making future payments of alimony a lien upon real estate were too obvious for discussion, but remarked that it was not necessary to declare a lien in the decree, because "as for all sums ordered to be paid at once, and for which execution may issue, they are already general liens without being so expressed." And in *Olin v. Hungerford*, 10 Ohio, 268, it was held that a decree for alimony to be paid in installments is not a lien on defendant's land unless made a charge thereon by the decree itself, though it was intimated that if the alimony was payable in a gross sum it would be. In *King v. Miller*, 10 Wash. 274, 38 Pac. 1020, the periodical payments were made a lien on certain of the husband's lands; the court held that a subsequent judgment for a gross sum in lieu of such periodical payments would also become a lien. In *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609, the court made an allowance for the wife in the form of pecuniary payments at successive monthly intervals, and charged them as a lien on certain community property which was set apart to the husband. The court held that the right to execution for these payments did not accrue until they respectively fell due, and that the lien for any unpaid installment accruing after the expiration of five years from the entry of the judgment, could be foreclosed notwithstanding a statute which prescribed a period of five years from the entry of judgments, in general, as the period within which execution could issue.

B. Effect of Mere Commencement of Suit.—The question what effect the commencement of a suit for divorce has with respect to constituting notice that the property of the husband and wife is in litigation is naturally one involving the doctrine of *lis pendens*. "In order to bring the doctrine of *lis pendens* into effect, it is indispensable that the litigation should be about some specific thing which must necessarily be affected by the termination of the suit. It does not apply to an action for divorce and for alimony to be paid out of the husband's estate because such a suit does not apply to any specified part of the husband's estate, real or personal. The judgment which may be obtained may, from the docketing thereof, constitute a lien on certain property; but in this, as well as in all other respects, it no more constitutes a *lis pendens* or a claim to particular estate than a suit upon a promissory note or any other sufficient cause of action. It is not sufficient that the judgment, unless otherwise paid, will be satisfied out of the sale of certain real estate. A mere suit to recover a money judgment does not prevent alienations by the defendant *pendente lite* unless it is in the enforcement of a lien on, or otherwise is directed against the title to, specific prop-

erty": Freeman on Judgments, sec. 196; Brightman v. Brightman, 1 R. I. 112; Hamlin v. Bevans, 7 Ohio, 161, 28 Am. Dec. 625; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Sapp v. Wightman, 103 Ill. 150; Daniel v. Hodges, 87 N. C. 95; Houston v. Timmerman, 17 Or. 499, 11 Am. St. Rep. 848, 21 Pac. 1037, 4 L. R. A. 716; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781. In Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614, it was held that the doctrine of *lis pendens* would not apply to action for divorce where no specific property was pointed out, and there was only a general prayer for alimony; but that the doctrine would apply if the property was definitely described and sought to be affected by the proceedings. The same holding was also made in Tolerton v. Williard, 30 Ohio St. 579. So, also, in Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 20 Pac. 156, the court, after stating the general rule where the complaint does not describe the property of the defendant, said: "But where the statute permits the husband's estate to be set apart to the wife for life, or, if necessary, in fee, for her support, and in her complaint she specifically describes property which she asks the court to decree to her for her support, there seems to be no well-founded reason why the rule of *lis pendens* should not apply. True, it may be said that the decree of divorce is the first object of the suit, and that support is but an incident. But it is also true that when divorce is sought and granted, and support is required from the husband, the law permits the court, and it is the court's duty to provide such support as is reasonable and just, under all the circumstances. In such a case, a purchaser pendente lite, with notice of the suit and its objects, knows that the object of the suit is to obtain a decree awarding such property to her." In Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812, it was held where the wife in a divorce action files an answer and cross-petition for a divorce in her favor together with alimony and describes the husband's real estate, that a person who subsequently takes a mortgage on the real estate is bound by the decree thereafter rendered. And in Sun Ina Co. v. White, 123 Cal. 196, 55 Pac. 902, it was held that the pendency of divorce proceedings does not of itself interrupt the exercise of the husband's power of disposition of the community property or of his separate property, though he is held to good faith in the disposition of it and cannot make a voluntary conveyance with intent to deprive the wife of her claim. And it was also held in the same case that the mere description of the property in a cross-complaint by the wife without any prayer that alimony be charged as a lien thereon, and the mere filing of a notice of *lis pendens* without any order of court charging alimony as a lien on the property does not give the alimony allowed any priority over a mortgage given by the husband pendente lite, notwithstanding actual notice by the mortgagee of the pendency of the divorce action and the claim of alimony therein.

C. Power of Court to Restrain Alienation.—Pending a bill for a divorce by the wife, the court may make an order restraining the husband from conveying his property pending the bill, but such order will not affect purchasers of him without notice of it: *Frakes v. Brown*, 2 Blackf. 295; *Uhl v. Irwin*, 3 Okla. 388, 41 Pac. 376. In *Rourke v. Rourke*, 8 Md. 427, an order was entered enjoining the disposition of certain real estate of the defendant in another county until the judgment awarding plaintiff a certain fixed amount of alimony was either paid or replevied. The appellate court held that the lower court could enter such an order. But in *Griswold v. Griswold*, 111 Ill. App. 279, the court said: "It is also of doubtful propriety for a court of equity to permanently enjoin a husband from selling or disposing of his property." Although the practice of restraining the disposition of property during the pendency of a divorce action is of frequent occurrence, the cases in which the subject is discussed do not seem to be very numerous.

D. Power to Require Security for Alimony.—The court may also require the husband to give security for the payment of the alimony awarded, though it seems that the power to do so is exercised by virtue of statutory authority: *Forrest v. Forrest*, 6 Duer, 102; *Burr v. Burr*, 10 Paige, 38; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145. In *Murphy v. Moyle*, 17 Utah, 113, 70 Am. St. Rep. 767, 53 Pac. 1010, it was held if there is danger that a divorced husband may dispose of his property by conveyance or squander it, so that nothing will remain upon which the decree of divorce providing for alimony or the support of minor children can operate, the court may require him to furnish security for its performance. Though the decision does not clearly show it, the holding seems to be based upon a statutory provision giving the court rather plenary powers in such cases.

E. Effect of Mere Judgment.—In *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. 169, 33 L. R. A. 708, a judgment for alimony in favor of a woman was held to make her a judgment creditor of her former husband, and as such entitled to avail herself of all the remedies given by the statute to judgment creditors. And in *Campbell v. Trosper*, 22 Ky. Law Rep. 277, 57 S. W. 245, it was held where a judgment for alimony does not provide for a lien on the estate of the divorced husband, only a personal liability is created. See, also, the cases discussed in the section on the Nature of the Decree for Alimony.

F. Necessity for Decree to be Specific.—In *Hills v. Hills*, 76 Me. 486, it was held that real estate cannot be sequestered for the purpose of securing the payment of alimony or allowances so as to establish a lien thereon unless it be described by such definite terms as will identify it. And in *Hamlin's Lessee v. Bevans*, 7 Ohio, 161, 28 Am. Dec. 625, it was held that the lien of a judgment rendered pending a petition for divorce and before rendition of a decree for

alimony, is superior to that of the decree for alimony where it does not allege a claim to any specific tract of land or pray for alimony by way of annuity upon the husband's real estate generally. In *Lawten's Petition*, 12 B. I. 210, the court held that the words in a divorce decree awarding alimony, reciting that the alimony was "to be paid by the said Robert out of his real and personal estate," did not create a charge or lien on the husband's real estate, because it was usual for such decrees to be specific. So, also, in *Hall v. Harrington*, 7 Colo. App. 479, 44 Pac. 365, it was strongly intimated that there could be no lien for alimony as against a bona fide purchaser unless the property was specifically described. But in *Wightman v. Wightman*, 45 Ill. 174, the court said that a decree for alimony was a lien on the lands of the judgment debtor without a decree to that effect. But the court was perhaps quite strongly controlled in its declaration by viewing such a decree as being the same as a judgment at law. See, also, the discussion of the subject under the section entitled the "Nature of Decree for Alimony."

G. Necessity for Statutory Authority.—As a general rule, the courts do not advert to any statutory authority as the basis for declaring the alimony awarded a lien on the real estate of the party against whom it is decreed. In *Foster v. Foster*, 56 Vt. 540, the court adverted to the statute which provides that on the dissolution of a marriage the court may decree to the wife such part of the real and personal estate of her husband as it deems just, and said that that power clearly includes the power to charge it with the payment of money awarded in lieu thereof on the principle laid down by Domat that in laws conferring power the greater authority implies the lesser of the same nature. Substantially the same reasoning was used in *Blankenship v. Blankenship*, 19 Kan. 159, where the court referring to the case of *Brandon v. Brandon*, 14 Kan. 342, which authorized the sale of the property of the husband in order to allow alimony to the wife, said: "The power to take the homestead from the husband and assign the same to the wife is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same to be sold to discharge the lien. The greater power includes the less." But the court in *Swansen v. Swansen*, 12 Neb. 210, 10 N. W. 713, under a statute allowing the court to require the giving of security and, in lieu, the sequestration of the property of the husband by the appointment of a receiver, held a decree making the alimony awarded a lien on the husband's real estate erroneous, and said that the procedure pointed out by the statute should be followed. In *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 113, 43 Pac. 130, the court held, in the absence of express statutory authority, that it could not decree permanent alimony to be a lien on defendant's personal property.

H. Effect of Decree for Alimony on Homestead.—It has been declared that where the alimony awarded has been decreed to be a special lien upon the homestead that the lien will be effective against the homestead, even though the title be in the husband: *Abey v. Abey*, 32 Iowa, 575; *Hemenway v. Wood*, 53 Iowa, 21, 3 N. W. 794; *Blankenship v. Blankenship*, 19 Kan. 159; *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334; *Best v. Zutavern*, 53 Met. 604, 74 N. W. 64; *Brady v. Kreuger*, 8 S. Dak. 464, 79 Am. St. Rep. 771, 66 N. W. 1083; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358. But it is also held that where the decree awarding alimony does not declare the alimony a special lien upon the homestead, that the homestead cannot be sold under an execution sale made pursuant to the decree: *Byers v. Byers*, 21 Iowa, 268; *Biffle v. Pullam*, 114 Mo. 50, 21 S. W. 450; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358. The recent case of *Fraaman v. Fraaman*, 64 Neb. 472, 97 Am. St. Rep. 650, 90 N. W. 245, appears to extend the doctrine. In that case it does not appear whether the alimony awarded was decreed to be a special lien or not. An execution was, however, issued on the judgment for alimony and levied upon the family homestead. It was contended that the homestead was exempt from a sale under execution, but the court held that a judgment for alimony was a lien upon the family homestead. The court based its decision upon the authority of *Best v. Zutavern*, 53 Neb. 604, 74 N. W. 64, but the judgment for alimony in that case was made a specific lien upon the homestead.

I. Effect of Territorial Jurisdiction.—In *Hall v. Harrington*, 7 Colo. App. 479, 44 Pac. 365, the question whether the court could declare a lien for alimony on property outside of its territorial limits was raised, but not directly passed on. The appellate court, however, expressed itself to the effect that the court would have no power to create such a lien. In *Sapp v. Wightman*, 103 Ill. 150, it was held that a decree for the payment of money was under the Illinois statute a lien to the same extent as a judgment at law and subject to the same territorial limitations. In *Holmes v. Holmes*, 29 N. J. Eq. 9, permanent alimony was made a charge against the real property of the defendant in the state, although he was a nonresident. The cases do not seem to be numerous in which the question has been raised.

J. Retroactive Operation of Decree.—In *Smythe v. Banks*, 73 Ga. 303, it was held under the Georgia code which provided that permanent alimony shall be continued to a wife after her husband's death that a decree for alimony takes precedence of an earlier judgment. But the rule is different while the husband is still alive: *Carithers v. Venable*, 52 Ga. 394. So, also, in *Daniels v. Lindley*, 44 Iowa, 567, the court held that a decree for alimony could not be dated back so as to take effect from the date of an attachment to the exclusion of intervening judgment creditors.

b. **In Suits for Maintenance or Separation.**—The marriage ties are not dissolved by a decree of separation from bed and board, hence the wife is entitled to support by the husband after such a decree: *State v. Ellis*, 50 La. Ann. 559, 23 South. 445. And the court has power to allow temporary alimony in a suit for separate maintenance: *Miller v. Miller*, 33 Fla. 453, 15 South. 222, 24 L. R. A. 137; *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963; *Simpson v. Simpson*, 91 Iowa, 235, 59 N. W. 22; *Verner v. Verner*, 62 Miss. 260; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Sanford v. Sanford*, 2 R. I. 64. The same general rules which prevail with respect to absolute divorces would seem to also prevail in suits for maintenance. The right to make the fixed payments of alimony in suits for maintenance a lien on the real estate of the defendant was affirmed in *Johnson v. Johnson*, 125 Ill. 510, 10 N. E. 891, and *Tobey v. Tobey*, 100 Mich. 54, 58 N. W. 629. But the right to make an allowance of alimony in such a suit a lien on the personal property of the defendant was denied in *Harris v. Harris*, 109 Ill. App. 148. And in *Clubb v. Clubb*, 23 Ky. Law Rep. 650, 63 S. W. 587, which was a suit for maintenance, the court held that the husband could not be required to execute a bond for the amount of the allowance awarded to the wife. In *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626, it was held where a wife in a suit for maintenance seeks to set aside transfers made by the husband in fraud of her rights, the court should subject to its judgment only so much of the property as is necessary to satisfy it and should exempt the remainder. In *Sun Ins. Co. v. White*, 123 Cal. 196, 55 Pac. 902, the defendant in a divorce action filed a cross-complaint wherein she asked for permanent alimony, maintenance and a division of the common property. She also filed in the recorder's office wherein the real estate was situated a notice of the pendency of the action and the object of her cross-complaint. The decree restrained the disposition of the property until the alimony awarded was adjusted.

c. **In Suits for Annulment of Marriage.**—Permanent alimony is not awarded in suits for the annulment of the marriage on the ground of its being void ab initio: *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127; *Appleton v. Warner*, 51 Barb. 270; *Herron v. Herron*, 28 Misc. Rep. 323, 59 N. Y. Supp. 861; *Stewart v. Vandevort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. It was held, however, in *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127, that the court could in such cases make an equitable division of property jointly acquired while the parties lived together as husband and wife. In *Strode v. Strode*, 66 Ky. 227, 96 Am. Dec. 211, it was held that a woman abandoned by a man whom she had married in ignorance of the fact that he had a wife living in another state was entitled to alimony. But alimony pendente lite is often allowed in such suits: *Prine v. Prine*, 3 Fla. 676, 18 South. 781, 34 L. R. A. 87; *Vroom*

v. Marsh, 29 N. J. Eq. 15; North v. North, 1 Barb. Ch. 241, 43 Am. Dec. 778; O'Dea v. O'Dea, 31 Hun, 441; Lea v. Lea, 104 N. C. 603, 17 Am. St. Rep. 692, 10 S. E. 488. But in Bloodgood v. Bloodgood, 59 How. Pr. 42, alimony pendente lite was not allowed to the wife in an action to annul the marriage on the ground of physical incapacity. And in Stivers v. Wise, 18 App. Div. 316, 46 N. Y. Supp. 9, it was held in an action by a parent to annul the marriage of her infant son, that alimony pendente lite could not be awarded against the plaintiff to be paid by the parent. And in Taylor v. Taylor, 7 Colo. App. 549, 44 Pac. 675, the appellate court refused to allow alimony pendente lite after the trial court had found that there was no legal marriage. Thus it will be seen that the general rules applicable to suits for absolute divorce are not generally applicable to suits for annulment of marriage except in so far as the question of temporary alimony is concerned. We have not observed any suits for annulment in which the creation of a lien for alimony was involved.

IV. Enforcement of the Lien.

a. In General.—The method of enforcing liens created in alimony decrees does not seem to have been very often the subject of judicial inquiry. It has been declared by some of those courts which regard a decree for alimony as merely creating a lien similar to that created by a judgment at law, that the decree is enforceable in the same manner as any other money judgment: Conrad v. Everich, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58; Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Tyler v. Tyler, 99 Ky. 31, 34 S. W. 898; Dufrene v. Johnson, 60 Neb. 18, 82 N. W. 107. But where the decree creates a specific lien to secure the payment of the alimony awarded, it is most likely a matter to be determined by each court or by the terms of the decree itself how the lien created may be enforced. In Hemenway v. Wood, 53 Iowa, 21, 3 N. W. 794, the lien for alimony was enforced by a sheriff's sale by virtue of the decree, but the opinion does not show any further details. In Fraaman v. Fraaman, 64 Neb. 472, 97 Am. St. Rep. 650, 90 N. W. 245, the judgment for alimony was declared a lien on the family homestead, though it does not appear that it so declared in the decree itself. The decree was enforced by a levy and sale of the homestead under execution. In Errissman v. Errissman, 25 Ill. 136, the court in speaking generally of the powers of the trial court in regard to such decrees, said: "The decree should have made the alimony a lien upon the land and for the purpose of better giving notice of the lien, it would have been very proper to have required the defendant to have given a mortgage upon the land for the security of the payment of the alimony and only continued the injunction as to the land until such mortgage should have been executed, acknowledged and delivered. In Abey v. Abey, 32 Iowa, 575, the appellate court in directing the decree for alimony to be thereafter entered, allowed the sum awarded

to become a lien on the homestead and among other things directed: "In default of payment, execution may issue." It seems to us that the ordinary practice regarding the enforcement of liens by a court of equity should prevail. "A decree may direct the sale of property to satisfy a lien or for some other purpose, in which case, in the absence of any statute to the contrary, the commissioner or other officer authorized to make the sale, may proceed by authority of the decree alone, without any order of sale or other process. It is usual, in most of the states, to issue upon such decrees what are commonly called orders of sale, which either recite the substance of the decree or refer to an annexed copy, and command the officer to execute the decree. The decree itself must be regarded as of paramount authority": Freeman on Executions, sec. 37a. "In suits for divorce, a wife is often awarded alimony not payable in one gross sum, but at stated and frequently recurring periods, and the question has arisen whether the payment of such sums may be enforced by scire facias as well as by attachment for contempt. In such a case, it seems clear that execution cannot issue as a matter of course, for it may be that some contingency has arisen under which she has no longer any right to exact alimony, or it may have been paid as directed in the decree. Some notice ought to be given the party claimed to be in default before any writ is issued against his person or property. The proceeding by scire facias is well adapted to giving the requisite notice, and there seems to be no doubt that it is an appropriate and perhaps the exclusive proceeding in such cases": Freeman on Executions, sec. 82; Morton v. Morton, 4 Cush. 518. It would seem that the above rule would be also applicable where the alimony was declared a specific lien on certain real estate.

b. *Effect of Lien on Contempt or Other Proceedings.*—In Wightman v. Wightman, 45 Ill. 174, the court said: "We have no doubt a court of chancery has power, in addition to making a decree for alimony a lien on the lands of a defendant, which it would be without a decree to that effect, to enforce the decree by attachment for contempt, and if the defendant remains contumacious, defying the court, may also sequester his estate, real and personal, as a means of enforcing performance of the decree": See, also, O'Callaghan v. O'Callaghan, 69 Ill. 552, to the same effect. In Bonney v. Bonney, 98 Ill. App. 129, it was held where notes are given merely to evidence installments of alimony, the court can enforce their payment by attachment for contempt notwithstanding that the party aggrieved has a remedy at law by suit in such notes. See Evans v. Stewart, 18 Ky. Law Rep. 941, 38 S. W. 697, and State v. King, 49 La. Ann. 1508, 22 South. 887, as having a general bearing on the subject.

WELLS v. SWEENEY.

[16 S. Dak. 489, 94 N. W. 394.]

COTENANCY—Partition—Possession.—Under a statute providing that one or more of several cotenants holding and being in possession of real property may bring suit for partition, it is absolutely essential, to maintain such suit, that the defendant shall be in possession of the property sought to be partitioned as a cotenant with the plaintiff. (pp. 714, 715.)

PARTITION OF HOMESTEAD.—During the lifetime of the surviving husband, wife or any minor child, the homestead, possessed and occupied as such, cannot be partitioned among the heirs at law, except by consent of all of the interested parties. (p. 715.)

PARTITION OF HOMESTEAD.—The surviving husband in possession of the homestead owned by his deceased wife, and claiming his homestead rights therein, cannot maintain partition against the heirs of such deceased wife. (p. 716.)

HOMESTEADS—Survivor—Taxes and Repairs.—The rule requiring the tenant for life to pay all general taxes and keep up general repairs, applies to the surviving husband or wife occupying the homestead as such, and he or she cannot claim compensation therefor as against the remaindermen. (p. 718.)

HOMESTEADS—Survivor—Improvements.—The surviving husband in possession of the homestead is not entitled to make permanent improvements thereon, and make them a charge upon the property as against the minor children. (p. 718.)

C. W. Brown, for the appellant.

492 **CORSON, J.** This is an action for the partition of real property. Findings and judgment were in favor of the plaintiff, and the defendants appeal. The questions raised are fully presented by the findings of fact and conclusions of law, the material parts of which are, in substance: That one Elizabeth V. Wells, at the time of her death, was the owner in fee of a quarter section of land in Pennington county, described in the findings; that the plaintiff was the husband of the said Elizabeth V. Wells, and that the said land was used by the deceased and the plaintiff herein as a homestead up to the time of her death, on the twenty-fifth day of February, 1891; that ever since the death of the said wife, the plaintiff has continued to reside on the said premises and occupy the same as a homestead, and that he still resides thereon; that the defendants are the children of the deceased and the plaintiff, and that the plaintiff and the defendants are the only heirs at law of the said deceased; and that the deceased left no property, real or personal, except the homestead above described. From the

findings the court concludes, as matter of law, that the plaintiff is entitled to a decree awarding him in fee simple certain portions of the said premises, being one-third thereof. He also concludes that the defendants are entitled to a decree awarding to them the other two-thirds of the said premises, subject to the homestead right or life estate of the said plaintiff therein. It further concludes that the said plaintiff is entitled to the use and ⁴⁹³ occupation, rents and profits, of the portion of the said premises awarded to the defendants for and during his natural life, and that he shall pay the taxes and keep up the improvements on the said land during his natural life.

It will be observed from the findings of the court that the property described belonged to the wife of the plaintiff, and at the time of her decease was the homestead of herself and the plaintiff, and that since her death he has continued to reside upon and occupy the same as a homestead. The question presented, therefore, is, Can the homestead occupied as such by the surviving husband or wife be partitioned among the heirs during the lifetime of the survivor?

It is contended on the part of the appellants that the homestead in the exclusive possession of the sole surviving husband, claiming and retaining his life estate therein, cannot be partitioned in a suit by him against the heirs or reversioners. Section 5362 of the Compiled Laws of Dakota of 1887 provides: "When several cotenants hold and are in possession of real property as partners, joint tenants, or tenants in common, . . . an action may be brought by one or more of such persons for a partition thereof." It will be observed that it is only when several cotenants hold and are in possession of the real property that an action for the partition thereof is authorized. It will be noticed that it is found by the court that the premises constituted the homestead of the plaintiff and his wife in her lifetime and up to the time of her death, and that he is in possession of the same, claiming his homestead rights therein as her surviving husband. It is not affirmatively stated in the findings that the defendants were in possession of any part of the premises as cotenants of the plaintiff or otherwise, and ⁴⁹⁴ we may fairly infer from the findings that the plaintiff was in the sole and exclusive possession of the same. But, in any event, it is not shown that the defendants, or either of them, were in possession at the time the action was commenced; hence the action for partition against them cannot be maintained under the findings, as one of the essential conditions prescribed

by the statute is that the defendant shall be in possession of the property sought to be partitioned as cotenant or tenant in common with the plaintiff: 15 Ency. of Pl. & Pr. 784. While this omission in the finding might be a ground for reversal of the judgment, we prefer to place our decision upon a broader ground, namely, that during the lifetime of the surviving husband, wife, or any minor child, the homestead cannot be partitioned among the heirs at law, except by consent of all the parties interested in the same. Section 5778 of the Compiled Laws of Dakota of 1887 provides: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age." Section 2463 of the Political Code is a verbatim copy of the above section. The succeeding sections (2464, 2465) read as follows: "Such homestead shall descend according to the law of succession as provided by the Civil Code, unless otherwise directed or disposed of by will, and shall be held exempt from any antecedent debt of the parent, and if it descends to the issue of either husband or wife it shall be held by such issue exempt from debts of such husband or wife except as in the following section provided. . . . And if there be no husband or wife surviving, and no issue, the homestead ⁴⁹⁵ shall be liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead." And by section 5763 of the Compiled Laws of Dakota of 1887 it is provided that an executor or administrator must make out and return to the court a true inventory of all the estate of the decedent except the homestead. These provisions clearly show that it was the intention of the law-making power that the homestead should not be partitioned among the heirs, or returned as assets of the estate, or sold or conveyed, so long as it is occupied by either the surviving husband, wife or any minor child as a homestead.

So far as the rights of the surviving husband, wife or minor children to occupy the property as a homestead are concerned, it is not material in which party the legal title is vested, and hence, if there are heirs of the party holding the legal title, they will not be entitled to a partition of the property during the lifetime of the surviving husband or wife or minor children who actually possess and occupy the premises as a homestead:

Burns v. Keas, 21 Iowa, 257; Nicholas v. Purcell, 21 Iowa, 266, 89 Am. Dec. 572; Dodds v. Dodds, 26 Iowa, 311; Orman v. Orman, 26 Iowa, 361. If the heirs are not entitled to a partition of the homestead during the lifetime of the surviving husband or wife or minor children who actually occupy the same as a homestead, it would seem to necessarily follow that such survivor would not be entitled to a partition of the same so long as he or she occupied the same as a homestead. Undoubtedly the surviving husband in this case might have abandoned his homestead right and claimed his share of the homestead property, in which case there could have been a partition of the same between the plaintiff and the defendants, if the defendants ⁴⁹⁶ had all attained their majority. But the plaintiff's case is not based upon that theory. He still claims his homestead right and his right to possess and occupy all of the homestead property during his lifetime, but demands a partition of the property in order that his one-third interest therein may be set apart to him, and the other two-thirds set apart to the defendants, but subject to his homestead right of occupancy of the whole. The law, as we construe it, does not authorize such a proceeding. The statute of this state as to homestead rights of husband and wife and minor children in homestead property seems to have been taken from the statutes of Iowa, and the courts of that state have repeatedly held that there can be no partition of the homestead property during the life of the surviving husband or wife or minor children, unless the homestead has actually been abandoned by all of the parties entitled to possession of the same: See cases above cited; Voelz v. Voelz, 88 Wis. 461, 60 N. W. 707. We are of the opinion, therefore, that the conclusion of the circuit court that the plaintiff was entitled to a judgment for partition is clearly erroneous.

The defendants allege in their answer that in order to preserve the property they expended a large sum in the payment of taxes, namely, the sum of nine hundred and ninety-four dollars and seventy-four cents. The court finds that this sum was so paid by the defendants, but concludes that the sum of one hundred and nineteen dollars and sixty cents—taxes for the year 1890—was a claim against the estate of the deceased, and was, through failure of the defendants to present their claim to the administrator, barred, and is not properly a charge against the plaintiff. The court further concludes that the defendants are entitled to the amount paid for taxes for the years 1891 to

1897, inclusive, ⁴⁹⁷ aggregating the sum of eight hundred and seventy-five dollars and fourteen cents, but concludes that the same should be offset by the sum of one thousand and ninety-three dollars paid by the plaintiff for the improvements which the court find the plaintiff made upon the property, and the two hundred and fifty-three dollars and fifty cents paid by him for the costs of administration.

It is contended on the part of the appellants that it is the duty of the plaintiff to keep the premises in repair and to pay all the ordinary taxes upon the land during his tenancy, and that the neglect to do so constitutes waste entitling the defendants to recover so much of the rents and profits as may be necessary to pay the taxes. It is assumed by the appellants that the plaintiff is a tenant for life, and, as such, is bound by all the obligations imposed upon such tenant. The possession of the surviving husband or wife or minor children of the homestead is somewhat peculiar. As we have seen, the plaintiff in this case is not only a tenant for life, but he is absolute owner of a one-third interest in the property. As to the other two-thirds, he may be properly treated and considered as tenant for life, but as to the one-third he must be regarded as owner. The plaintiff's relation to the property is one created by statute, and is not easily defined.

In *Voelz v. Voelz*, 88 Wis. 461, 60 N. W. 707, the supreme court of Wisconsin, in speaking of a surviving widow, uses the following language: "It is useless to speculate as to what kind of an estate the widow's homestead right, as it is called, in this statute is, or as to how it should be classified. It is sufficient that it is accompanied by actual and exclusive possession that cannot be disturbed so long as she lives unmarried. The court, therefore, had no jurisdiction over it in this case." The proceeding in that case was one for partition brought by the heirs of the deceased ⁴⁹⁸ husband. Our statutes upon the subject of survivorship and rights to homestead property are substantially the same as the statutes of Wisconsin, except that in this state the wife may retain possession of the homestead during her life, notwithstanding she may have remarried, and may inherit a part of the real estate as heir of her deceased husband, while under the Wisconsin law a widow only becomes entitled to a dower which terminates with her life.

It seems, however, to be just and equitable that the rule requiring the tenant for life to pay all the general taxes (Dak. Comp. Laws, 1887, sec. 2787) should be applied to the sur-

viving husband or wife and minor children who occupy the homestead as such. That section reads as follows: "The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance."

That it is the duty of the tenant for life to keep up the general taxes upon the property held by him as such tenant is not only required by our code, but seems to be well settled by the authorities: 1 Washburn on Real Property, 130; Murch v. J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213; St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756; Cairns v. Chabert, 3 Edw. Ch. 313; Defreese v. Lake, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744; Cooley on Taxation, 467. It is quite clear, therefore, that the defendants, who were compelled to pay the taxes in order to protect their interest in the estate, are entitled to a judgment requiring the plaintiff to reimburse them for the amount so necessarily paid, and that the same should be made ⁴⁹⁹ a lien upon the property itself, instead of a lien upon the rents and profits of the same.

It is further contended on the part of the appellants that, if the tenant for life makes repairs or permanent improvements on the premises, he cannot claim compensation for the same from the remaindermen. The duty to keep the property in repair is imposed upon the tenant for life by the section of the statute quoted, and this duty may properly be imposed upon the party in possession of the homestead. This rule seems to be quite well settled by the authorities also: Sohier v. Eldredge, 103 Mass. 351; 1 Washburn on Real Property, 123; Parsons v. Winslow, 16 Mass. 361; 6 Am. & Eng. Ency. of Law, 1st ed., 882.

Treating the plaintiff, therefore, at least as quasi tenant for life, it is his duty to keep the premises in repair, and he was not authorized to make permanent improvements and make the same a charge upon the property as against the defendants in this action. What the rights of his heirs may be, upon the death of the plaintiff, regarding these improvements, it is not now necessary to decide.

It is contended on the part of the appellants that, as all of the facts are before the court, the defendants in equity are entitled to a full adjustment of their taxes in this proceeding, and this, in our opinion, should be done.

The judgment of the court below is reversed, and that court is directed to enter a judgment in favor of the defendants for the amount of the taxes found to have been paid by them, and interest thereon, and directing that the same constitute a lien on the plaintiff's interest in the premises in his own right, and also his interest in the homestead as surviving husband ⁵⁰⁰ of Elizabeth V. Wells, deceased, and providing that, in case the said judgment shall not be paid within a reasonable time, to be specified by the court, the interest of the plaintiff therein shall be sold to satisfy said judgment and costs, subject to redemption.

A Homestead in the possession of a surviving husband or wife cannot be partitioned among the heirs of the deceased, but may be retained by the survivor without interference from them: *Dodds v. Dodds*, 26 Iowa, 311; *Nicholas v. Purczell*, 21 Iowa, 265, 89 Am. Dec. 572. Partition in connection with the distribution of estates of decedents is considered in the monographic note to *Buckley v. Superior Court*, 41 Am. St. Rep. 140-151. In *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, it is held that one of two heirs is entitled to a partition of the estate of their ancestor while it is in course of settlement in the probate court.

It is the Duty of a Life Tenant to keep the current taxes paid: *Abernethy v. Orton*, 42 Or. 437, 95 Am. St. Rep. 774, and cases cited in the cross-reference note thereto.

ROCHFORD v. MCGEE.

[16 S. Dak. 606, 94 N. W. 695.]

ALTERATION OF INSTRUMENTS.—An Application for Insurance on a single sheet of paper, containing at the end a note intended to secure assessments is a single contract, and the removal of the note, the signing of which is secured under false representations, is a material alteration of the instrument, rendering it void even in the hands of a bona fide holder for value, even if such note is written and signed below a perforated line, if the general appearance of the paper is such that it shows that the signer was not guilty of negligence in signing it. (p. 720.)

J. Kirby, for the appellant.

U. S. G. Cherry, for the respondent.

⁶⁰⁷ FULLER, J. The record in this action on a promissory note resulting in findings of fact favorable to the defendant, and a judgment accordingly entered, discloses, among other

facts, the following: On the twenty-sixth day of September, 1901, an authorized agent of the Germania Livestock Insurance Company, by means of grossly false and fraudulent representations, upon which the defendant relied, procured his signature in two places to a one-paged instrument, purporting to be an application for insurance in such corporation, by which the applicant was to be indemnified in the sum of one thousand dollars against loss arising at any time within five years by reason of the death of a certain stallion therein described. As a part of this application for insurance, and toward the bottom of the sheet containing the same, and just below the first signature of the defendant and a delicately perforated line, extending entirely across the page, and closely resembling a number of dotted lines above, there was, in printing, writing and figures, the promissory note in suit, signed by the defendant, and thereafter detached at the perforated line without his acquiescence, knowledge or ^{his} consent. Although it was determined that plaintiff purchased the note without notice of the fraud, the trial court concluded, in effect, that the paper constituted an integral portion of a continuous instrument, denominated "Application for Insurance," and was made a part thereof for the purpose of securing the payment of subsequent assessments, none of which were ever made, and that the same is non-negotiable; that the detachment and separation of the lower portion of the instrument constitute a material alteration, rendering what appears to be a negotiable promissory note void in the hands of a bona fide holder. The record clearly justifies the inference that the entire instrument, including the detached portion, was fraudulent in its inception, without consideration, and secured under such circumstances that the defendant was not guilty of negligence.

The Germania Livestock Insurance Company, named in the note as payee, was a corporation organized pursuant to chapter 71, page 201 of the Laws of 1897, under the provisions of which it possessed no power to insure livestock against any loss other than that occasioned by fire, lightning, hail, tornadoes, cyclones and hurricanes; and in this instance there was an attempt to insure generally against death from any cause, in an amount tenfold greater than that authorized. Section 8 of the act prohibits the insurance of property in any incorporated city or village, and expressly declares that all notes taken as evidence of indebtedness for unpaid assessments shall be in all cases non-negotiable. When the application was written, and continu-

ously thereafter, the stallion was kept in the incorporated village of Hartford, and that part of the paper involved in this action was taken in the form of a negotiable promissory ⁶⁰⁰ note. Had there been no material alteration, no false and fraudulent representations, orally made, it is apparent from the statute that the recitals above mentioned would preclude a recovery in the hands of a third party, without further notice than that imported by the face of the instrument. The trial court having found plaintiff to be a good faith purchaser, it is needless to determine whether, under all the circumstances, the fact that the note was made payable to the "Germania Livestock Insurance Co. (a corporation) or order" was sufficient to put upon inquiry a purchaser in the due course of business. The destruction of that part of the page above the perforated line materially changed the identity and legal effect of an instrument which, if otherwise valid, was payable only upon certain contingencies. In the absence of negligence on the part of the maker, it is well settled that an alteration which thus changes the relation of the immediate parties vitiates the instrument, not only as to them, but as against a bona fide holder or indorsee without notice: *Porter v. Hardy*, 10 N. Dak. 551, 88 N. W. 458, 2 Cyc. 177, and numerous cases there collated. It is contrary to every rational conception of justice to hold a blameless person liable upon an instrument from which fundamental recitals, constituting a perfect defense, have been wrongfully eliminated and the privity of contract destroyed.

The judgment appealed from is affirmed.

The Unauthorized Alteration of written instruments is the subject of a monographic note to Burgess v. Blake, 86 Am. St. Rep. 80-134. As to whether the alteration of a negotiable instrument invalidates it in the hands of a bona fide holder, see *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; *Boston Steel etc. Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426; *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256, 101 Am. St. Rep. 701; note to *Burgess v. Blake*, 86 Am. St. Rep. 121.

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MURPHY v. REDEKER.

[16 S. Dak. 615, 94 N. W. 697.]

LIMITATION OF ACTIONS—Payment of Taxes.—If a statute of limitations provides that one of the conditions of obtaining title under it is that an occupant of land shall pay the taxes thereon under color of title for a specified number of years, and such party pays all taxes assessed against the land and extended against him on the tax-books for the statutory period, he has complied with this requisite of the law, although an annual assessment has become delinquent and is not paid until the following year. (p. 724.)

H. H. Potter and I. O. Curtiss, for the appellant.

T. L. Bouck and G. S. Rix, for the respondents.

615 FULLER, J. In this equitable action to quiet the title to certain real property it is conclusively shown and conceded upon the record that either the defendants, or those under whom they hold by purchase, have been in continuous possession and actual occupancy of the premises, claiming in good faith under color of title, for more than ten successive years, and have paid all taxes assessed thereon since the year 1883; that continuously since the seventh day of November, 1888, when a foreclosure proceeding regular in every respect ripened into a sheriff's deed, the purport of the paper title of each person in possession, and so paying the annual taxes, has been that of an owner in fee simple.

616 Our statute on the subject of acquiring title by the continued payment of taxes on land immediately occupied under color of title is as follows: "Every person in the actual possession of lands or tenements, under claim and color of title made in good faith, and who shall have continued for ten successive years in such possession, and shall also, during said time, have paid all taxes legally assessed on such lands or tenements shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession, by purchase, devise, or descent, before said ten years shall have expired, and who shall have continued such possession and payment of taxes as aforesaid so as to complete said term of ten years of such possession and payment of taxes, shall be entitled to the benefits of this section": Laws 1891, c. 24, sec. 1, p. 78. The application and legal effect of the foregoing statute

are not controverted, but counsel for appellant maintain that each payment must be made within the year for which the tax was levied, and that a delay on the part of one of the earlier claimants in paying the taxes of 1891 until June 9, 1892, is fatal to respondents' claim of ownership. Without placing upon the plain terms in which the legislature has spoken a construction different from the ordinary meaning of the words employed, and by which the real purpose of the enactment would be often defeated, the contention of counsel is not sustainable. Beyond question, the payment of all legal taxes during ten successive years by persons clearly within the statute in every other respect is a substantial compliance therewith, although an annual assessment becomes delinquent, and is not paid until the following year. ⁶¹⁷ Numerous states have provided for the acquisition of land by occupants paying taxes in good faith under color of title for a specified number of years, and the statute of Illinois is practically the same as our provision above quoted. For many years the courts of that state, under a seven year limitation, have held unswervingly upon the proposition as follows: "Although the taxes upon land may not have been paid within each year for seven successive years, yet, if they were paid in one year for another of the seven, the party still being in possession under claim and color of title, the requirements of the statute of limitations, which took effect in 1839, will have been complied with": *Hinchman v. Whetstone*, 23 Ill. 185. In construing a statute of Texas intended to effect the same purpose that prompted our enactment, that court say: "To support the five year statute of limitations, the taxes need not be paid each year as they accrue." So far as it relates to the payment of taxes, the language of section 1694 of the General Laws of 1877 of Colorado is identically the same as the provision under consideration, and the headnote relating thereto prepared by the court is as follows: "Where a statute of limitations provides that one of the conditions of obtaining a title under it is that the party claiming title shall, for a stated time, pay all taxes assessed, if the party pays to the collector all taxes assessed by the assessor, and extended against him on the tax-book, he has complied with this requisite of the law, although he may not have paid interest on the taxes, due because of non-payment of the same at the time they were due, if such interest has not been ascertained and charged to him by the collector, and he has not been required by such collector to pay the same": *Latta v. Clifford* (C. C.), 47 Fed. 614.

⁶¹⁸ As our view of the statute corresponds exactly with that taken by the trial court, and is decisive of the case, we are not called upon to examine other points urged in the briefs of respective counsel.

The judgment appealed from is affirmed.

The Payment of Taxes is not, independently of statute, essential to acquiring title by adverse possession: *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691. But many of the statutes of limitation require such payment for a specified number of successive years as a condition to the ripening of a prescriptive title: *Converse v. Duan*, 166 Ill. 25, 46 N. E. 747; *Taylor v. Brymer*, 17 Tex. Civ. App. 517, 42 S. W. 999. Under such statutes, however, it seems that payment need not be made each year as the taxes accrue: *Hinchman v. Whetstone*, 23 Ill. 185; *Snowden v. Bush*, 76 Tex. 197, 13 S. W. 189; *Capps v. Deegan* (Tex. Civ. App.), 50 S. W. 151; *Latta v. Clifford*, 47 Fed. 614.

LONG v. COLLINS.

[16 S. Dak. 625, 94 N. W. 700.]

EXEMPTIONS.—Judgment for Costs recovered by a debtor on appeal in a successful attempt to resist the wrongful taking of his exempt property under a judgment in favor of the defendant is a judgment recovered in protecting his exemption, and is itself exempt, and not subject to setoff. (p. 726.)

F. G. Bohri and F. E. Strawder, for the appellant.

S. A. Keenan, for the respondents.

⁶²⁵ **CORSON, J.** This is an appeal from an order made by the circuit court offsetting two judgments of the respective parties. It will be necessary, for a proper understanding of this case, to give a brief statement of the proceedings leading up to the order appealed from. In 1893 the bank, which is the real defendant, ⁶²⁶ recovered judgment against the plaintiff, Long, for one hundred and six dollars and forty cents, upon a promissory note executed by Long while the fifteen hundred dollars statute of exemption was in force. Subsequently the bank caused an execution to be issued and levied upon certain property of Long, which he claimed to be exempt; and thereupon Long brought an action to recover the value of the property so levied upon, and recovered a judgment against the bank for two hundred and twenty-two dollars. From this latter

judgment the bank took an appeal to this court, and the same was reversed on the ground of irregularity on the part of the jurors in finding their verdict, and a judgment was entered in favor of the bank in this court for its costs, amounting to eighty-three dollars and eighty-five cents: Long v. Collins, 12 S. Dak. 621, 82 N. W. 95. The action was then retried in the court below, and a judgment again entered in favor of Long. Thereupon the bank moved the court to offset its original judgment against Long for one hundred and six dollars and forty cents, and its judgment for eighty-three dollars and eighty-five cents recovered in this court against the plaintiff's judgment recovered for the value of the exempt property, which order was granted. From this order, Long, the plaintiff, appealed to this court, and on such appeal the order of the circuit court was reversed on the ground that Long's judgment, being recovered for exempt property, was also exempt, and this court entered a judgment in favor of Long for the sum of eighty-two dollars and seventy-three cents costs in this court: Long v. Collins, 15 S. Dak. 259, 88 N. W. 571. See, in addition to cases therein cited, Below v. Robbins, 76 Wis. 600, 20 Am. St. Rep. 89, 45 N. W. 416, 8 L. R. A. 467. Upon the judgment being docketed in the court below, the bank again moved to have the two supreme court judgments offset against each other, which was granted, and from the order sustaining this motion this appeal is taken.

⁶²⁷ The appellant contends that his judgment against the bank for eighty-two dollars and seventy-three cents, being for costs obtained in recovering a judgment for the conversion of his exempt property, takes the character of his exempt property, and is also exempt. The respondent insists in support of the order that the judgment of this court for costs on appeal constitutes no part of the exempt property, and, not being exempt under the present exemption laws, was the subject of offset, and that the court's ruling is therefore correct. We are of the opinion that the appellant is correct in his contention. It will be observed that the circuit court, by its order offsetting the plaintiff's judgment recovered for the value of his exempt property, pro tanto, as against the judgments held against the plaintiff by the bank, in fact deprived the plaintiff of the benefit of his exemption, and that it was necessary, therefore, for him to appeal to this court to secure the benefit of such exemption. The costs, therefore, recovered by him in this court, incurred in protecting his exempt property, and resisting the bank's

efforts to have it applied in satisfaction of its judgment, properly constitute a part of his exempt property. If the judgment itself was exempt—and we held in the former case that it was so exempt—the costs incurred in maintaining his right to such exemption must certainly be regarded as a part of the exempt property. It has always been the rule of this court that the exemption law should be liberally construed in favor of the debtor, and that it is the duty of the courts to, as far as possible, protect the debtor's rights to his legal exemption. It would be manifestly unjust in the case at bar to allow the defendant to subject the plaintiff to a large amount of costs in order to secure his exemptions, unless the costs awarded to the plaintiff could be held to constitute a part of his exemptions. The learned circuit court evidently overlooked the fact, in making its order, that the judgment of the plaintiff was for costs incurred in order to secure his exemptions.

The order of the circuit court is reversed.

A Judgment for the wrongful conversion by a sheriff of exempt property is, together with costs, also exempt: *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89. See, too, *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670, and cases cited in the cross-reference note thereto; *Cox v. Bearden*, 84 Ga. 304, 20 Am. St. Rep. 359; *Burke v. Hance*, 76 Tex. 76, 18 Am. St. Rep. 28.

PORTLAND CONSOLIDATED MINING COMPANY v. ROSSITER.

[16 S. Dak. 633, 94 N. W. 702.]

CORPORATIONS—Preferences—Trust Fund.—The capital stock of every corporation is a trust fund for the payment of its debts, and its creditors have the right of priority of payment over any stockholder. (p. 729.)

CORPORATIONS—Insolvency—Preferences.—If a portion of the directors of an insolvent corporation owning a certain part of causes of action against it assign them to a third person, who, after service of summons on such directors as vice-president and secretary of the corporation, has a default judgment entered under which all the property of the corporation is sold in satisfaction thereof amounting to less than one-half of the value of the property, such judgment is fraudulent and void as to other creditors of the corporation. (p. 730.)

Martin & Mason, for the appellant.

McLaughlin & McLaughlin, for the respondents.

634 FULLER, J. On its own behalf, as well as that of all other creditors choosing to participate, plaintiff, a corporation and judgment creditor, after exhausting its remedy at law, instituted this action against Michael D. Rossiter and his co-defendant, an insolvent corporation, for the purpose of obtaining a decree in equity subjecting the property of such corporation to the payment of its debts. On the ground that the facts stated were not sufficient to constitute a cause of action, the trial court sustained a demurrer to the complaint in the nature of a creditors' bill, and plaintiff appeals.

Omitting reference to the usual averments of corporate capacity, the amount due on appellant's judgment, the insolvency of both respondents, and issuance of an execution, which was returned unsatisfied, counsel for appellant fairly state the substance of the material facts alleged in the complaint as follows:

"5. On February 14, 1898, the said defendant Rossiter obtained by default a judgment in the circuit court of Lawrence county, South Dakota, against the defendant corporation upon six causes of action for the aggregate sum of seventeen thousand nine hundred and twelve dollars and fifty-three cents.

"6. That each of the causes of action mentioned in the foregoing paragraph were assigned by the owners thereof to the defendant Rossiter solely for the purpose of placing the same in judgment, and that defendant Rossiter took said assignments as trustee of an express trust; that the owners of the said causes of action remain the real and equitable owners thereof, the defendant Rossiter simply representing them for the purpose of obtaining judgment thereon.

"7. That one of the said causes of action was and is in favor of Bryan E. Rossiter for an indebtedness incurred prior to the 635 commencement of said suit, to the amount, as alleged in said suit, of nine thousand one hundred and forty-six dollars and ninety-seven cents; that another of said causes of action was and is in favor of J. Stuart Stevenson on an indebtedness incurred prior to the commencement of said suit of an amount, as alleged therein, of two thousand and eighty-two dollars and ninety cents; upon information and belief that said Bryan E. Rossiter and J. Stuart Stevenson were at the time of the commencement of said action, and are now, directors and officers of the defendant corporation.

"8. That the summons in the action of Michael D. Rossiter against the defendant corporation was served upon the said Byran E. Rossiter as vice-president of the defendant corporation, and upon the said J. Stuart Stevenson, as secretary thereof, on January 12, 1898, and that no other parties were served with process in said action; that the said Byran E. Rossiter is the brother of the defendant, Michael D. Rossiter; and that by said suit of Michael D. Rossiter it was attempted to give a preference to directors and creditors of an insolvent corporation over other creditors thereof.

"9. That immediately upon the entry of said judgment in favor of said Michael D. Rossiter execution was issued thereon, and levied upon the cyanide mill premises, machinery, etc., of the defendant corporation, situated in the first ward of Deadwood, South Dakota; that such proceedings were thereupon had that the said property so levied upon was on March 28, 1898, sold to the defendant Michael D. Rossiter by the sheriff of Lawrence county for the full amount of said judgment, interest and costs, and that the said Michael D. Rossiter now claims to be the owner thereof.

636 "10. That the value of said cyanide mill, machinery and appurtenances so sold to said Michael D. Rossiter is forty-five thousand dollars; that the defendant corporation has no other property than that so sold to the said Michael D. Rossiter.

"11. That the said execution sale to the said Michael D. Rossiter was made with intent to hinder, delay and defraud this plaintiff and the creditors of the defendant corporation; and that the same does hinder, delay and defraud this plaintiff and the other creditors of the defendant corporation.

"12. That the cyanide mill and appurtenances was at the date of said sale, and has been ever since, leased, and that the defendant Michael D. Rossiter has since said sale, and is now, collecting the rentals and income therefrom; that the defendant Rossiter claims that the interest of the corporation in the land upon which said mill and machinery are situated was at the date of said sale leased upon a two years' unexpired leasehold term, and defendants claim that said execution sale was, therefore, absolute, and not subject to redemption, but that said cyanide mill and machinery were prior to said sale the property of the defendant corporation, which had the right to remove the same after the expiration of its said lease. The plaintiff prayed judgment for a receiver of the rents and incomes; for an injunction restraining defendant Rossiter from encumbering

or disposing of the property attempted to be purchased at execution sale; that the judgment referred to in favor of defendant Rossiter against the defendant corporation and the execution sale thereon be declared void, and be set aside, and that the property so attempted to be sold be applied in satisfaction of plaintiff's judgment and of the claims of other creditors who should come in under this proceeding and contribute to the expenses thereof."

⁶²⁷ The question of law to be determined is whether a judgment against an insolvent corporation, obtained in the manner stated, and for the purpose of preferring officers and stockholders, is void as to creditors. Applying an elementary rule giving creditors priority over stockholders, we said, in *Adams etc. Co. v. Deyette*, 5 S. Dak. 424, 49 Am. St. Rep. 887, 59 N. W. 216, that: "Persons extending credit to such corporation do so upon the faith that its officers and agents will conduct its affairs in a manner consistent with business principles; and when such officers devote the corporate assets to their individual use and benefit to the exclusion of creditors, courts without hesitation characterize such acts, as to creditors, fraudulent and void." It was also held in *South Bend Toy Mfg. Co. v. Pierre Fire etc. Ins. Co.*, 4 S. Dak. 173, 56 N. W. 98, that: "The capital stock of every corporation is a trust fund for the payment of its debts, and its creditors have the right of priority of payment over any stockholder. Judgment creditors of a corporation may sustain an action as in equity to reach and apply concealed assets or misappropriated property, the same as against individual debtors." So far as can be determined in the absence of a brief on the part of respondents, the proposition is not questioned that directors of an insolvent corporation are precluded from obtaining advantage for themselves to the prejudice of other creditors, but the theory upon which the demurrer was sustained appears to be that a preference secured through ordinary proceedings of law is unassailable. The conclusion reached in *Adams etc. Co. v. Deyette*, 5 S. Dak. 424, 49 Am. St. Rep. 887, 59 N. W. 216, that the directors of an insolvent corporation, as trustees for all creditors, are bound to preserve and equally administer all of the property in the interest of all of the creditors, and are incapable of ⁶²⁸ preferring one another is broad enough to include a judgment by default secured principally for their exclusive benefit, and by service of the summons upon themselves. In the case of *Tennant v. Appleby*

(N. J. Ch.), 41 Atl. 110, it was held by the New Jersey court of chancery that: "Where a director who was controlling stockholder obtained a judgment against his corporation, and by a levy secured a lien on practically all of the assets for the purpose of preferring himself to other creditors when the corporation was insolvent, it was a violation of his duty as trustee of corporate funds for the creditors; and his assignee pendente lite with notice may be required to pay the proceeds over for distribution among all the creditors." Under the circumstances of the case now before us and upon principle there is no distinction between the confessed judgment adjudged by this court to be fraudulent and void in the case of *Adams etc. Co. v. Deyette*, 5 S. Dak. 424, 49 Am. St. Rep. 887, 59 N. W. 216, and the default judgment here sought to be vacated and set aside. It would be inequitable to judicially sanction this judgment and execution sale of all the corporate property, aggregating forty-five thousand dollars, in satisfaction of an antecedent debt of less than one-half that amount, two-thirds of which is owned by directors of the insolvent corporation charged with the legal obligation of protecting the paramount rights of creditors.

The order sustaining the demurrer is reversed and the case remanded for further proceedings.

The Property of an Insolvent Corporation is generally regarded as a trust fund in such a sense as to preclude the officers of the corporation from dealing with it in such a manner as to secure preferences to themselves, and such preferences are ordinarily fraudulent and void as to unsecured creditors: See the monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78; *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841; *Rockford etc. Grocery Co. v. Standard Grocery etc. Co.*, 175 Ill. 89, 67 Am. St. Rep. 205.

CASES

IN THE

SUPREME COURT

OF

TENNESSEE.

McCAMPBELL v. FOUNTAIN HEAD RAILROAD CO.

[111 Tenn. 55, 77 S. W. 1070.]

CORPORATIONS—Contract Ultra Vires—Subscription to Stock in Another Corporation.—A subscription for stock in a land corporation made by a railroad company is ultra vires, although such subscription was made in the names of trustees for the company. (p. 737.)

CORPORATIONS—Accommodation Indorsements.—In the absence of express or necessarily implied power given in its charter, one corporation cannot indorse paper for the accommodation of another. Such act is ultra vires. (p. 738.)

CORPORATIONS—Relief of Minority Stockholders in Equity. Courts of equity are prompt to redress the injuries of minority stockholders in corporations against the wrongdoing of the majority, after the former have sought relief through the corporation without success. The minority must first seek relief from the corporation, except in cases where that would be but an idle ceremony. (p. 738.)

CORPORATIONS—Acts Ultra Vires—Estoppel to Attack.—A stockholder in a corporation is estopped from attacking as unauthorized and ultra vires a corporate act, to which he has consented, or in the doing of which he has acquiesced an unreasonable length of time. (p. 739.)

CORPORATIONS—Acts Ultra Vires—Estoppel Against Purchaser of Stock to Attack.—If the owner of corporate stock is estopped to attack a corporate act, as unauthorized, because of his consent thereto or acquiescence therein for an unreasonable time, a purchaser of his stock is likewise estopped. (p. 745.)

CORPORATIONS—Act Ultra Vires—Relief Against by Purchaser of Stock.—Although a purchaser of stock in a corporation is estopped to attack as ultra vires a corporate act to which his vendor has consented, or long acquiesced in as to previous transactions, yet he may thus attack such act in so far as it creates new liabilities, arising after his purchase of the stock and the institution of his suit. (p. 745.)

Sansom, Welcker & Parker and Green & Shields, for the appellant.

Webb, McClung & Baker, for the appellees.

⁶⁸ BEARD, C. J. The bill in this case was filed by complainant, as a stockholder of the Fountain Head Railroad Company, for the use of herself and all of its other stockholders, against that company, the Knoxville and Fountain City Land Company, and the individual directors of both of these companies (they being the same persons), to set aside a subscription by the railroad company for \$100,000 of the stock of the Knoxville and Fountain City Land Company, and to recover the funds paid by the railroad company to the land company for this stock; also to set aside the indorsement of the railroad company upon something over \$300,000 of the notes of the land company, which are payable to or held by George Borgfeldt & Co., a corporation, the shareholders in which constitute the directors of these two companies; and to wind up the Fountain Head Railroad Company, pay its debts, and distribute its assets, on the ground that it had become a business failure because of the alleged fraudulent and illegal diversion of its funds from the legitimate purpose for which it was organized, by the present board of directors, who hold, as is averred, a majority of its stock, and are fraudulently mismanaging its affairs, to their own personal advantage, and to the destruction of the value of complainant's stock.

The pleadings in the case are very voluminous, and it would require very much time to state them with any degree of detail; but, as the finding of facts by the court of chancery appeals sufficiently presents the issues that ⁵⁹ were raised by them, we will content ourselves with summarizing it.

From this finding it appears the Fountain Head Railroad Company was chartered under the laws of this state in 1887 for the purpose of constructing and operating a short line from Knoxville to Fountain Head, in Knox county, a distance of some five or six miles. The charter is in the form prescribed by the statute of Tennessee, and, among other powers, grants to the stockholders and directors that of fixing the capital stock of the company and increasing it at their pleasure.

At first the company was capitalized at \$50,000, and stock to this amount was subscribed and paid for by different individuals. Mr. Curtis Cullen, of the firm of Cullen & Newman, of Knoxville, was interested in the enterprise from the begin-

ning; and his firm at a very early date became the owners of two hundred and eighty-five shares of the stock of the company, the par value of which was \$28,500. In the year 1890, after the road was put in operation, Mr. Cullen conceived the idea that it could be made very much more profitable to the stockholders, if the road itself, or its owners and operators, should buy up the lands lying along its line and near its terminus, at Fountain Head, with a view to a speculative advance in their value. Not having sufficient capital himself, and his firm also lacking it, Mr. Cullen went east in the year 1891, and interested in the scheme the defendant Brady, a citizen of the city of New York. Through him he was introduced to the firm of Borgfeldt & Co., a rich concern engaged in ⁶⁰ business in New York City, with wealthy connections in Germany. This firm and their associates, together with Brady, after consideration, determined to go into the scheme with Cullen & Newman. Originally it was agreed these parties should put into the investment \$100,000, and Cullen & Newman a like amount, and, to this end, that the capital stock of the railroad company should be increased to \$100,000, it being understood the latter parties were to make good their subscription to the increased capital stock with the stock already owned by them in the railroad company, and certain lands of which they represented themselves to be the owners, the aggregate value of the two being estimated at \$100,000. It was also agreed, in order to consummate this scheme, that all the original stock of the railroad company should be brought up and controlled by this syndicate.

To make sure that this plan was one which promised success, Brady, in his own interest and that of his New York associates, came to Knoxville, and there, overlooking the field, became satisfied the venture was a safe one. The matter, however, was submitted to a member of the Knoxville bar, who advised them that the railroad company itself could not buy and hold real estate for the purpose of speculation, and that it would be necessary to procure a charter for a land company, and, upon this being done, that the same end might be accomplished by a subscription of stock in it made by the former ⁶¹ company direct, or indirectly by trustees in its interest. Upon this suggestion a charter was obtained, and the defendant, the Knoxville and Fountain City Land Company, was organized.

In May, 1891, a meeting of the shareholders of the railroad company was held, at which the by-laws of the company were amended so as to increase the capital stock to \$200,000. For

this amendment the entire stock of the company present (being four hundred and fifty-five shares) voted, and the directors were instructed to offer for subscription fifteen hundred shares of stock, of the par value of \$100 each, with the view of making good this increase. At the same meeting a resolution was offered and adopted directing the board of directors of the railroad company, as soon as the fifteen hundred shares of additional stock had been subscribed, "to subscribe for and on behalf of the Fountain Head Railroad Company to the capital stock of the Knoxville and Fountain City Land Company the sum of \$100,000, the subscription to be made and the certificates of stock taken either in the name of this company, or in the name of trustees for the use of this company as it may be advised."

On the same day, and at that or a subsequent meeting, books were opened for subscription for these additional shares of capital stock, resulting in a subscription by Cullen & Newman for seven hundred shares of the new stock, of the par value of \$70,000; and by George Borgfeldt and his associates for eight hundred shares, of the par value of \$80,000. This being done, a motion was then made and adopted ⁶² directing the president of the company to subscribe to the capital stock of the land company the amount already indicated, and that this subscription be made in the name of trustees for the railroad company; the names of these trustees being set out in the motion, and spread upon the minutes. The subscription thus authorized was at once made.

Cullen & Newman paid for their seven hundred shares of this new stock as follows; that is to say, they were the owners of one hundred and sixty-eight acres of land, of which they made a conveyance to the land company. They at the same time gave a check for \$70,000 to the railroad company. This check was taken by Mr. Cullen, the president of the company, in full payment of the subscription of the stock of Cullen & Newman; and it was then indorsed by Cullen as president, and turned over to the land company in payment of the railroad company's subscription of \$70,000 to the stock of that company, and it was then treated as transferred or was actually transferred by that company to Cullen & Newman in payment of the tract of land above referred to. This check did not represent money. The drawers had no money in bank to meet it, and there was no purpose on their part that it should be presented and paid. Its use was adopted as a simple method to consummate the trans-

action. Cullen, the president of the railroad company, as has been seen, took the check in discharge of the subscription of Cullen & Newman to the stock of that company. He then delivered it to the land company in part payment of the subscription of ⁶³ stock made in the name of the trustees for the benefit of the railroad company; and then it was turned over to Cullen & Newman by this latter company, and discharged the obligation of the land company to Cullen & Newman upon the conveyance of the land. This method of canceling indebtedness by an interchange of credits was understood by all of the parties, and was contemplated as a part of the scheme.

At the time of this transaction Cullen & Newman had already bought up and controlled, for themselves and George Borgfeldt and associates, all of the original stock of the railroad company, or afterward acquired it, though it appears that in these meetings only \$45,500 out of the \$50,000 of this stock were present and voted.

The certificates of stock issued by the land company in the name of the trustees appointed on behalf of the railroad company have since been held by them for the benefit of that company.

We have already seen how \$70,000 of this subscription to the land company stock was paid. The balance of the subscription (that is, \$30,000) was paid in cash, this being a part of the \$80,000 paid by Borgfeldt and his associates to discharge their liability for the \$80,000 of the new stock which they took of the capital stock of railroad company.

All this was done under the management of Mr. Curtis Cullen, to whom control was largely delegated by Borgfeldt and his associates, they having, as is evident, entire confidence in his integrity and business ability.

⁶⁴ At the time this was done it was understood by Borgfeldt and his associates that Cullen & Newman were the owners of four hundred and fifty acres of land, which was to be turned over to them by the land company. It turned out, however, that they only owned and conveyed to that company, as has been before stated, one hundred and sixty-eight acres. It was also understood by these gentlemen that Cullen & Newman were to put in these lands at actual cost. It subsequently turned out, however, that they were turned over to the land company at double the amount they cost them. This produced a disagreement between Cullen & Newman and Borgfeldt and his associates, the result of which was that Cullen & Newman were

required to disgorge their \$25,000 or \$30,000 of the \$70,000 of new stock that had been issued to them. This fact, however, has no material bearing on this litigation, and need not be further followed.

As has already been stated, Borgfeldt and his associates paid into the treasury of the railroad company \$80,000 for their stock, and that of this amount \$30,000 was used in paying on the subscription of stock by that company to the land company. The remainder of this cash payment was used by the railroad company in purchasing new engines and paying outstanding liabilities of the railroad company, and in other ways, needless to mention.

As has been already seen, there was \$4,500 of the original stock of the railroad company, which seems not to ^{as} have been represented at the meetings of the shareholders held in May, 1891, when these various transactions were resolved upon; but the court of chancery appeals finds that all the stock was then owned and controlled by Cullen & Newman and by Borgfeldt and his associates, or was soon after acquired by them, and that all of this stock assented to these transactions as made; that afterward all of the original certificates of the \$50,000 of stock were surrendered, and new certificates issued and accepted in their places. That court further finds that "when the subscription, after the increase of the capital stock to \$200,000, was made by the railroad company to the stock of the land company, it was assented to by the holders of all the stock of the railroad company, and that this latter company had subscribed for and taken all the stock of the land company, so that the entire transaction was, as a matter of fact, understood by all the stockholders of the railroad company, and was agreed to or afterward ratified by all the stockholders of the railroad company, when this subscription was made, so that the whole transaction was one of unanimous consent by all the stockholders of the railroad company, both old and new."

The result of these transactions, instead of being profitable, as was anticipated by the parties engaged in them, proved to be disastrous. The land taken from Cullen & Newman, or afterward purchased through them, cost the land company \$235,000. The operations of the railroad ^{as} company were evidently not profitable. The land boom which existed at the time the land company was formed soon collapsed. The indebtedness of both companies seems rapidly to have increased. Both alike in their financial stress looked to, and were relieved by ad-

vances made by, George Borgfeldt and his associates, until at the time of the filing of the present bill the railroad company was indebted to these parties, as is alleged, in something like \$40,000, and the indebtedness of the land company to them amounted to something over \$300,000. This latter indebtedness grew out of the fact that these parties were compelled to furnish the money to pay the purchase price of the new lands bought by the land company, and to remove encumbrances on these lands, as well as on those turned over to the company by Cullen & Newman, and to pay for improvements of the railroad properties.

From the time of the organization of the land company the two companies have had the same boards of directors, and they have been regarded by the stockholders and directors of each as being in a large measure one. So close has been the relationship of these companies, that beginning as early as February, 1892, the Knoxville and Fountain City Land Company was authorized by its shareholders to issue demand notes to raise money to meet its liabilities, and the Fountain Head Railroad Company was authorized by its shareholders to indorse these notes; and it has turned out that at the filing of this bill the railroad company, in addition to its own ^{or} legitimate debts, was also liable as indorser upon all the paper issued by the land company to Borgfeldt and his associates for money advanced by them for the benefit of that company, amounting to the large sum set out above.

In the year of 1896 the firm of Cullen & Newman failed, and about this time they transferred the stock held by them in the railroad company to the complainant and other intervening petitioners, to be held by them as collateral to secure their debts. While thus pledged, none of it was transferred on the books of the company until a short time before the filing of the bill in this case, in the year 1900, and some of it was only transferred after the bill was filed. All this time, while these transactions were going on, this stock stood in the names of Cullen & Newman, and was voted by them as their own in the various meetings that were held, authorizing or approving these various transactions. Shortly before the bringing of the present suit, some of these parties, under the power given them in their pledges, sold the stock and bought it in, and others pursued this method after its institution. Upon these facts, there can be no doubt that in subscribing for stock in the land company the railroad company exceeded its charter powers, and

was guilty of an ultra vires act, and this is not altered by the fact that this subscription was made in the names of trustees for the company. And we think there is as little doubt that, with proper parties before the court, this subscription of stock would be canceled, and the land company would be compelled to pay back whatever ⁶⁸ amount of money it received from the officers of the railroad company in discharge of this unauthorized and illegal subscription. And it is also true it is well settled as a rule of law, in the absence of express or necessarily implied power given in the charter, that one corporation cannot indorse paper for the accommodation of another, so that, at the instance of parties not disqualified to act, a court of equity would in this case relieve the railroad company from liability on the indorsements of the paper issued by the land company, now held by George Borgfeldt and his associates. The question is, Are the complainants in an attitude to ask for such relief?

In addition to the above rules of law in regard to the charter powers of corporations, which are so well settled that they scarcely need a citation of authority, there is another principle which is equally clear, and that is that courts of equity are prompt to redress the injuries of minority stockholders against the wrongdoing of majorities; and, in view of the relations which exist between them and the corporation and its officers, the general rule is they are bound to seek their remedy through the corporation at a meeting of its shareholders, or by application to those in charge of its affairs. If relief cannot be obtained by either of these methods, then they themselves can come into equity seeking it. The only exception to the rule requiring the minority stockholders to proceed thus before they institute proceedings in behalf of themselves and their stockholders is when it appears that to seek such relief through these regular channels ⁶⁹ would be an idle ceremony: *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Detroit v. Deane*, 106 U. S. 537, 1 Sup. Ct. Rep. 560, 27 L. ed. 300.

It may be conceded, in view of this exception to the general rule, upon the averments of the present bill, as well as the case made out by the testimony, that redress, if obtainable at all by the complainant and the interveners, could only be secured by a bill such as the present one. So it may be said that, if the complainant and these interveners are entitled to a status in court, they have made good their right to it.

Treating this case as if Cullen & Newman had filed the

present bill, or that these complaining parties occupy no higher ground than would Cullen & Newman, in view of the facts found by the court of chancery appeals, are they entitled to the relief sought at the hands of the chancellor? From the facts already stated, we have here a case where the parties complaining, by their active co-operation with all the other stockholders of the railroad company, brought about the ultra vires complication from which they now seek to be relieved. Will their complaint be listened to? In Green's Brice's Ultra Vires, page 783, mere acquiescence in unauthorized and illegal transactions will be, it is said, sufficient to repel complaining stockholders. That author uses these words: "If an act be ultra vires, a corporation may raise the objection, whether against a corporation or against a creditor or other contracting party attempting to enforce such act, or his alleged claims or rights resulting ⁷⁰ therefrom. But if an incorporator desire protection against the party who has thus dealt with the corporation, he must have been prompt and energetic in repudiating the transaction, as he can be bound by acquiescence. So, if he do not quickly object, and give his objection vitality, the creditor will be justified in answering that he consents."

Mr. Cook, in his work on Corporations (volume 2, section 730), says: "After a stockholder has knowledge of an ultra vires, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter. As to what will constitute a reasonable time, depends on the circumstances of the case. If it is evident that the stockholder is waiting to see whether the unauthorized act will be profitable to the corporation, the court will refuse to grant him any relief. So, also, if a stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred. In like manner, where the stockholder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter; and, in general, where it is clear that the stockholder had a full knowledge of all the essential facts of an act which he might bring a suit to remedy, but which for an unreasonable length of time he fails to object to by a bill in equity, he will be held guilty of laches, and his right to institute his suit is barred."

⁷¹ Mr. Clark, in his condensed, but valuable work on Corporations (Hornbook series), on this subject, says: "Stockholders may be precluded by acquiescence, laches or estoppel from bring-

ing suit to redress injuries to the corporation by the directors or other officers, or by the majority of the stockholders, or by a third person, for such suits are subject to the familiar principle of equity jurisprudence that acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief.

. . . . Thus it was held that a stockholder could not bring suit for improper investments of corporate funds made three years before, if he knew them at the time and did not object; and it has often been held that a stockholder is estopped to object to corporate acts done with his consent." To this text the author cites *Dunphy v. Travelers' etc. Assn.*, 146 Mass. 495, 16 N. E. 436; 1 *Cumming Cas. Priv. Corp.* 769; *Dimpfel v. Ohio etc. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, 28 L. ed. 121; *Allen v. Wilson (C. C.)*, 28 Fed. 677; *Boyce v. Montank etc. Coal Co.*, 37 W. Va. 73, 16 S. E. 501; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *Peabody v. Flint*, 6 Allen, 54; *Gregory v. Patchett*, 33 Beav. 595; *Ashurst's Appeal*, 60 Pa. St. 290; *Watts' Appeal*, 78 Pa. St. 370; *Stewart v. Erie etc. Trans. Co.*, 17 Minn. (Gil. 348) 372.

In 2 *Beach on Private Corporations*, section 887, the rule is announced in these words: "The right to redress corporate acts ceases when the members have consented to the will of the majority." Mr. Morawetz (*Morawetz on Private Corporations*, sections 72 261, 262, 267, 623-625) lays down the same rule, as does also Judge Thompson in the fourth volume (sections 4569 and 4571), and Mr. Taylor in sections 275-281, of their several works on Corporations.

In *Alexander v. Searcy*, 81 Ga. 545, 12 Am. St. Rep. 337, 8 S. E. 630—a suit instituted by minority stockholders complaining of ultra vires acts—it was held that where notice of purchasers of stock of another corporation was had by the directors and stockholders, and the purchasing corporation regularly voted the stock, and had expended large sums of money for the benefit of the corporation under resolution of its stockholders, after from seven to fifteen years from the date of the purchase a court of equity would not listen, among other things, to the complaint of the minority stockholders that, being a corporation, it had no power under its charter to make such purchase.

In *Taylor v. South & North Alabama R. R. Co.*, 4 Woods, 575, 13 Fed. 152, the court says: "A stockholder of a corporation will not be allowed, after an unreasonable time, to disturb or rescind a contract made by his corporation after the same

has been fully executed, on the ground that it is ultra vires and in excess of the corporate powers granted by the charter of the corporation." And in *Stewart v. Erie etc. Transp. Co.*, 17 Minn. (Gil 348) 372, the court says: "If a stockholder assents to acts ultra vires, or, although not originally or expressly assenting, has for an unreasonable time acquiesced, and has permitted them to go unquestioned, so that other parties who have ⁷³ acted upon the faith of them (as, for instance, by making large appropriations of money) would suffer great injury from their repudiation, a court of equity would not be easily induced to grant relief at the instance of such stockholders." In *Peabody v. Flint*, 6 Allen, 54, an acquiescence and delay of three and one-half years was held to be a bar to such relief; in *Gregory v. Patchett*, 33 Beav. 595, six years were held to be a bar; and in *Ashurst's Appeal*, 60 Pa. St. 290, seven years were held to be a bar; and in *Dimpfel v. Ohio etc. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, 28 L. ed. 121, three years and eight months were held to be a bar.

As was well said by the court in *Alexander v. Searcy*, 81 Ga. 545, 12 Am. St. Rep. 337, 8 S. E. 630: "The general rule we deduce from the authorities . . . is that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and their stockholders for fraud, conspiracy, or acts ultra vires against the corporation, its officers, and others who participated therein, when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable length of time, they forfeit their right to equitable relief."

In *Great Western Ry. Co. v. Oxford etc. Ry. Co.*, 3 De Gex, M. & G. 341, it is said: "Where the summary interference of this court is invoked in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made in contravention of the ⁷⁴ rights for which they contend cannot call upon this court for its summary interference." And in *Smith v. Clay*, 3 Brown Ch. 639, it was announced that "nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing."

In *Alexander v. Searcy*, 81 Ga. 545, 12 Am. St. Rep. 337, 8 S. E. 630, above quoted from, the same argument is made as in the case at bar; that is, that no amount of acquiescence on the

part of the stockholders will make an act legal which is illegal; in other words, that no amount of acquiescence on the part of the stockholders would give power to the Fountain Head Railroad Company to purchase and own stock in the land company, or to indorse its paper, in the absence of a law authorizing it. To this argument that court replied, as we think properly: "We concede that, but, in our opinion, it does not follow that, because a railroad company has no power to purchase or own stock in another railroad company, a stockholder who has acquiesced therein for fifteen years should have a right to object. It may be true, and doubtless is, that no assent or acquiescence of the stockholders can validate such an act; but it is a different question whether, after a long acquiescence, the stockholders may take advantage of the invalidity of such acts. The act of purchasing and owning and voting stock in any railroad company by another railroad company may be *ultra vires* so far as the public are concerned, but we do not think that a stockholder who has acquiesced for fifteen years, and who has ⁷⁵ received money from the corporation by reason of the illegal act, should be allowed to make that question. His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity. The public or the state is not so bound. The state, through its proper officers, may at any time commence proceedings to prevent it, or declare it *ultra vires* or illegal." If it be true that mere acquiescence or laches will preclude a stockholder from making such question, then what show of right has a holder of stock, who has from time to time given his consent in open meeting to the doing of the acts of which he now complains?

Nor do the transferees of stock, such as are the complainant and the interveners in this suit, stand in any other or different position from Cullen & Newman. Mr. Morawetz, at section 267, volume 1, of his work on Corporations says: "A purchaser of shares acquires no greater rights than the prior holder. If a violation of the corporate rights is acquiesced in by all the other holders of stock, the action becomes extinguished thereby, and no other holders, present or future, would be entitled to complain." And again, in section 265, the same author says: "A shareholder who has acquired his shares after an unauthorized transaction had taken place certainly cannot place his complaint on the ground that he has suffered a wrong, or that his equitable rights have been infringed. Under these circumstances, a plaintiff's cause of action, if he have any, is derived by

purchase ⁷⁶ and transfer from the holder of the share." And in section 264 it is said: "If it appears in the progress of a suit that the complainant is personally disqualified from suing, the suit cannot proceed, although the other shareholders are entitled to relief. As, on the one hand, the plaintiff who has the right to complain of an act done to a numerous society, of which he is a member, is entitled to sue on behalf of himself and of others similarly interested, although no other may wish to sue. So, although there be a hundred who wish to institute a suit, and are entitled to sue, still, if they sue by a plaintiff who has personally precluded himself from suing, that suit cannot proceed."

These texts of the author are supported by authorities of the greatest weight. Among them are to be found *Bert v. British etc. Assn.*, 4 De Gex & J. 158; *Belmont v. Erie Ry. Co.*, 52 Barb. 663; *Hubbell v. Warren*, 8 Allen, 173; *Central R. R. Co. v. Collins*, 40 Ga. 616; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

"It is true," says Mr. Morawetz in section 263, "a shareholder who has acquiesced in an unauthorized act is not bound to submit to all future acts of a similar character, nor is a shareholder who has acquiesced in the making of an unauthorized and illegal contract necessarily precluded from applying to the courts to redress its performance; . . . but the courts are entitled to exercise a wide discretion in cases of this description. They should certainly not allow a shareholder to change his mind, and apply for an injunction to redress the performance ⁷⁷ of a contract to which he had previously consented, in any case in which this would be unfair to other persons"; citing *Ffooks v. South Western Ry. Co.*, 1 Smale & G. 142; *Graham v. Burkenhead Ry. Co.*, 2 McN. & G. 146; *Leo v. Union Pac. Ry. Co. (C. C.)*, 19 Fed. 283.

While, under authority of the rule stated in this last quotation, we think that the parties complaining in this suit would be entitled to relief as against similar acts to those passed which they seek to set aside, done after a reasonable protest against their repetition, yet neither under it nor any other authority to which we have referred in the course of this opinion, nor under any to which our attention has been called in the course of argument, can they ask to be relieved from liability incurred or acts done before the filing of their bill, either with their sanction, or that of the transferrers of the stock which they now hold. But it is insisted that, whatever may be the state

of the law elsewhere, our own cases are contrary to this ruling. We think, however, an examination of them does not support this insistence, and that no one of them announces a principle that is in conflict with the rule of fairness and right which precludes a party from attacking successfully a corporate act, however unauthorized it may be, to which he has given his consent, or in which there has been an acquiescence for the length of time disclosed in this record.

In *Marble Co. v. Harvey*, 92 Tenn. 116, 36 Am. St. Rep. 71, 20 S. W. 427, 18 L. R. A. 252, there was an effort by a corporation to enforce an ultra vires contract as ⁷⁸ against the other party to this contract; and it was held, and properly, that such a suit could not be maintained. In the case of *Grant v. Look-out Mountain Co.*, 93 Tenn. 691, 28 S. W. 90, 27 L. R. A. 98, it was simply held that a corporation is liable for reasonable attorney's fees incurred in the successful prosecution of a just and necessary suit by a minority of its stockholders against itself, its officers or directors, for the benefit of the company, to enjoin the fraudulent disposition of its properties, or to recover properties already fraudulently transferred, and that the attorneys successfully prosecuting the suit were entitled to a lien upon the property recovered therein. In such a suit the judicial machinery of the court is set in motion by the dissenting shareholders for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff. That case, however, is to be distinguished from this, in that the minority shareholders thus suing had never disqualified themselves, either by consent actually given or long acquiescence in the acts of fraud of which they made successful complaint. In *Railroad Co. v. Sneed*, 99 Tenn. 1, 41 S. W. 364, 47 S. W. 89, an effort was made to hold the defendant on a subscription to an ultra vires and unlawful increase of the capital stock of a railroad company; and it was ruled that although the defendant had been a director in the company by virtue of this stock, and paid up a large portion of his subscription, yet the contract would not be enforced against him or his representatives. ⁷⁹ As will be seen, this was an effort to enforce performance by the corporation itself of a contract which it had no right to make. The case of *State v. Mitchell*, 104 Tenn. 336, 58 S. W. 365, we think, has no bearing on the question we have been discussing.

So it is we are constrained to hold, upon the whole case, the complainant and the interveners, occupying the position they

do, are not entitled to the decree which they seek by their bill. They cannot follow the funds of the railroad company into the real estate acquired by the land company; nor are they entitled to a decree against the managing owners of the railroad company for investing its capital in the stock of the land company, nor to a decree relieving the railroad company from its liability upon indorsements of the paper of the land company held by Borgfeldt and his associates at the time of the institution of this suit. The court of chancery appeals held that they were entitled to have these two companies disassociated, and the relations between them dissevered; and, to this end, that court decreed that the stock held by the railroad company in the land company should be sold, and its proceeds paid into the treasury of the former company. This relief was not contemplated by the bill, and is in the face of the logic of this opinion, yet, as no complaint was made to this part of the decree by either party, we are disposed to affirm it, and direct its execution, if complainant desires it. We think, however, that, under the authority of the rule announced in section 263 of Morawetz on Private Corporations,⁸⁰ set out in full in a former part of this opinion, that complainant and the interveners are entitled to be relieved from liability incurred by the railroad company in the indorsement of the paper of the land company made since the institution of this suit, where that paper embraced new debts incurred by the latter company with Borgfeldt and his associates, but that, so far as these indorsements cover liabilities which were incurred before the filing of the bill, they are entitled to no such relief.

The case will be remanded, if appellants so desire, with a view of effectuating a sale of the stock before referred to, under the orders of the chancellor, and also for the purpose of stating an account between the railroad company and Borgfeldt and his associates, with a view of ascertaining the liability of the company to them for advances made for its benefit, and also with a view of eliminating from the indorsed paper all sums advanced by Borgfeldt and associates to the land company since the filing of the present bill, embraced in any indorsed paper now held by them, and of any usury that may be found in the various claims of Borgfeldt and associates. We agree with the court of chancery appeals that no case is made out which would authorize a court of equity to take the management of the railroad company out of the hands of the majority stockholders, or to wind it up as an insolvent corporation.

With the modifications indicated above, the decree of that court is affirmed.

The Right of One Corporation to Acquire Stock in another is the subject of a monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 137-142. See, too, the subsequent cases of *Cannon v. Brush Elec. Co.*, 96 Md. 446, 94 Am. St. Rep. 584; *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476; *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57. As to the right of a corporation to purchase its own stock, see the note to *Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 339-347; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569.

The Purchaser of Certificates of Stock ordinarily takes them subject to all equities existing against the assignor: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752; *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73. But while they are not negotiable in the full sense, they do make an approach toward negotiability: *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115; *Shattuck v. American Cement Co.*, 205 Pa. St. 197, 97 Am. St. Rep. 735, and cases cited in the cross-reference note thereto.

The Right of a Shareholder to Sue to redress a corporate wrong or to maintain an action in behalf of the corporation is the subject of a monographic note to *Jones v. McLester*, 97 Am. St. Rep. 29-52. As to whether the plaintiff must show in such a case that he was a stockholder at the time of the transaction of which he complains, see page 38 of this note.

COPE v. PAYNE.

[111 Tenn. 128, 76 S. W. 820.]

UNLAWFUL ENTRY AND DETAINER—Who Bound by Judgment.—If an action of unlawful entry and detainer is brought against a tenant alone without making the landlord a party thereto, the latter is not bound by the judgment rendered therein, although he had knowledge of the pendency of the action. (p. 747.)

JUDGMENTS Bind Only Parties and Privies, and mere knowledge of the pendency of the action will not bind one not a party thereto. (p. 747.)

UNLAWFUL ENTRY AND DETAINER—Equity Jurisdiction to Quiet Possession.—An action of unlawful entry and detainer will not lie to dispossess a purchaser under a decree of a court of competent jurisdiction placed in possession by an order of the court, and a court of equity will entertain an application to quiet and prevent a wrongful interference with such possession. (p. 748.)

Pritchard & Sizer, for the appellant.

McCroskey & Peace, for the appellee.

¹²⁰ SHIELDS, J. This bill is brought to protect and quiet complainant's possession of the lands described in the pleadings, the threatened injury to his possession being the impending execution of a writ of possession which the defendant had caused to be issued upon a judgment which he recovered in an action of unlawful entry and detainer brought by him against a tenant of complainant (no question of title is involved), which is sought to be enjoined.

Morris Cope purchased the land in controversy at a tax sale made in 1897 under a decree pronounced in the case of *State v. Heiskell et al.*, lately pending in the chancery court at Madisonville, and was placed in possession of it after confirmation of sale and vestiture of ¹²⁰ title by the sheriff of the county in the execution of a writ of possession issued in said case. Subsequently he leased the lands to William Cantrell, and then conveyed them to the complainant. Frank Payne, previous to said tax sale, was in possession under a purchase from some one, and was not a party to the case in which the sale was made at which Morris Cope purchased. In 1901, conceiving that he was not bound by the tax sale, he instituted an action of forcible and unlawful entry and detainer against Cantrell, complainant's tenant, to recover possession. The case was dismissed by the justice of the peace, and was appealed to the circuit court of Monroe county, and, Cantrell making no defense, judgment by default was entered, and upon this judgment the writ of possession sought to be enjoined was issued. Complainant knew that this action was begun before the justice of the peace, and that the justice had decided it in favor of Cantrell, but he did not know of the appeal, and was not informed of it until after the judgment by default had been taken and writ of possession had issued. He was no party to the case, and is not bound or estopped by the judgment entered in it. It is only parties and their privies who are precluded by judgments and decrees. The mere knowledge of the pendency of the suit will not have that effect.

In the case of *Boles v. Smith*, 5 Sneed, 105—an action of ejectment—it is said: "It is a plain elementary principle of justice that no one ought to be concluded by a judgment, as to a matter of private right, to which he ¹²¹ was not a party, against which he could not avail himself of the means provided by law for the assertion and protection of his rights, and from which he could not appeal or prosecute a writ of error. . . . It is clear that Boles was no party to the former action in the

legal sense of the term, and the fact that he officiously, or by the favor of the court, was permitted to interfere in conducting the defense, does not affect the question. He had no legal right to do so." This statement of the rule is approved by the later cases of *Hillman v. Chester*, 12 Heisk. 34-36, and *Boro v. Harris*, 13 Lea, 36-44. It is also well settled that the law will not allow the owner of property to be deprived of possession in a suit brought against a tenant through the collusion of the latter with the plaintiff, or his negligence in failing to notify the owner of the pendency of the suit: *Collins v. Legg*, 1 Lea, 120.

Nor is there anything in the manner in which the complainant's vendor obtained possession of the premises which prevents a court of equity from protecting that possession. Complainant is not a trespasser or a wrongdoer. He does not come in court with unclean hands. It is true that defendant is not bound by the decree in the case of *State v. Heiskell et al.*, to which he was not a party, and that, if he is the rightful owner of the property sold, he has the right to be restored to possession by proper application to the chancery court in that case for a writ of restitution, or by an action of ejectment; but this does not convict complainant of any inequitable ¹²² conduct for which he ought to be repelled by the court. The vendor of the complainant was put into peaceable possession by the sheriff of the county in the execution of the mandate of a court of competent jurisdiction, under a purchase made by him, supported by a valuable consideration, and he had a right to presume that the proceedings in the case in which the sale was made were regular and valid, and vested him with a good title and the right to the possession of the property. He had no notice of any infirmity in the sale. His possession is in a sense legal, and he is entitled to hold the property against all claimants until they show a superior title or right to the possession in a proper proceeding or action for that purpose. The action of forcible and unlawful entry and detainer will not lie to dispossess a purchaser under a decree of a court of competent jurisdiction placed in possession by an order of the court: *Scott v. Newsom*, 4 Sneed, 456; *Rook v. Godfrey*, 105 Tenn. 534, 58 S. W. 850. The complainant is in the actual possession of the land, placed there under the process of the chancery court of the county in which it lies, and the defendant is attempting to wrongfully interfere with that possession. We think a proper case is presented in this record for an application to a court of equity to quiet and prevent a wrongful interference with his

possession. The jurisdiction of the court to give such relief is well established: *King v. Mabry*, 3 Lea, 237; *Walker v. Fox*, 85 Tenn. 154, 2 S. W. 98.

¹²³ The decree of the court of chancery appeals is therefore reversed, and the decree of the chancellor sustaining the bill of complaint and perpetually enjoining the execution of the writ of possession caused to be issued by the defendant is affirmed, with costs.

A Judgment Against a Tenant cannot estop his landlord who was no party thereto: *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159.

What is a Forcible Entry is discussed in the monographic note to *Enill v. Conwell*, 18 Am. Dec. 139-148. And evidence of title in actions of forcible entry and unlawful detainer is discussed in the monographic note to *Beeler v. Cardwell*, 77 Am. Dec. 552-557. One who has been turned out of possession by a writ issued by virtue of a decree to which he was not a party may proceed by action of forcible entry and detainer to recover possession: *Laird v. Winters*, 27 Tex. 440, 86 Am. Dec. 620.

WARREN v. CLEVELAND.

[111 Tenn. 174, 76 S. W. 910.]

LIMITATION OF ACTIONS—New Promise or Acknowledgment of Debt.—In order to remove the bar of the statute of limitations there must be either an express promise to pay or an acknowledgment of the debt accompanied by an expression of willingness to pay it, and the mere fact that a debtor "recognized the claim up to a short time before his death," is not sufficient. (p. 750.)

Young & Young, for the appellant.

McCroskey & Peace and W. M. Harrison, for the appellee.

¹⁷⁵ NEIL, J. In the course of administration of the estate of D. H. Cleveland a controversy arose over the claim of Mrs. Hudson for about twelve hundred dollars.

It was insisted by the executor that this claim was barred by the statute of limitations, and the chancellor found in favor of this contention.

After stating that the consideration of this claim was the boarding of Mrs. Hudson's younger sisters, and that the justice of the debt had been proven, the court of chancery appeals found as follows: "But we are satisfied from the proof that

her claim is clearly barred by the statute of limitations, which was interposed by the executor of her father to the allowance of the claim. It is true there is some proof in the record, undisputed, that Mr. Cleveland, her father, recognized ¹⁷⁶ this claim up till a short time before his death; but the proof fails, clearly, we think, to show that he made any promise to pay it within six years before his death."

Upon this finding of facts the court of chancery appeals ruled the law as follows: "The law is that the mere recognition of a claim or debt will not prevent the operation of the statute of limitation against it. It requires not only recognition, but a distinct and unconditional promise to pay it, to prevent the running of the statute."

The point of the assignment is that a mere recognition of the debt is sufficient to take the case out of the operation of the statute.

We have been unable to find sufficient authority in our decisions to support this contention. The cases that come nearest to it are the following: *Harwell v. McCulloch*, 2 Over. 275, 278; *Russell v. Gass*, Mart. & Y. 271-274; *Partee v. Badger*, 4 Yerg. 174, 26 Am. Dec. 220; *Hunter v. Starkes*, 8 Humph. 656; *Luna v. Edmiston*, 5 Sneed, 160. All of these cases, except *Hunter v. Starkes*, 8 Humph. 656, state, in substance, that an unconditional acknowledgment of the indebtedness is sufficient to remove the bar of the statute. In the latter case (*Hunter v. Starkes*, 8 Humph. 656), it is held that an admission that the amount claimed by the contract has never been paid is as sufficient for the purpose as a direct promise to pay. This case is substantially an authority for the position assumed by counsel for Mrs. Hudson; and if it stood alone, ¹⁷⁷ or even if it stood only with the other cases just cited, we should be content to hold that a recognition of the debt within six years would be sufficient. But we have a long line of cases which hold that, in order to remove the bar of the statute, there must be either an express promise to pay, or an acknowledgment of the debt accompanied by the expression of a willingness to pay it: *Jordan v. Jordan*, 85 Tenn. 566, 3 S. W. 896; *Shown v. Hawkins*, 85 Tenn. 216, 2 S. W. 34; *Malone v. Searight*, 8 Lea, 91-94; *Fuqua v. Dinwiddie*, 6 Lea, 648; *Roller v. Bachman*, 5 Lea, 156, 157; *Bachman v. Roller*, 9 Baxt. 409-412, 40 Am. Rep. 97; *Rogers v. Southern*, 4 Baxt. 67-69; *McFerrin v. Woods*, 3 Baxt. 242-247; *Allison v. Bradford*, 1 Shannon's Tenn. Cas. 619-621; *Broddie v. Johnson*, 1 Sneed, 465; *Butler v. Winters*, 2 Swan,

92; Ott v. Whitworth, 8 Humph. 493-496; Hale v. Hale, 4 Humph. 183-185; Thompson v. French, 10 Yerg. 456; Crowder v. Nichol, 9 Yerg. 453-455; Belote v. Wynne, 7 Yerg. 534.

The weight of authority is very strongly in favor of the rule as last stated. We do not think that a finding merely that the deceased "recognized this claim up to a short time before his death" is sufficient. There would have to be other facts stated, showing more distinctly the character of the recognition, and that it amounted either to a direct promise, or an acknowledgment of the existence of the debt, coupled with an expression of a willingness to pay it.

While, therefore, we do not fully agree with the court ¹⁷⁸ of chancery appeals in its statement of the law that there must be an express promise to pay in order to take a debt out of the bar of the statute of limitations, yet, under the authorities above cited, we are constrained to hold that that court reached a correct conclusion as to the existence of the bar, and that the decree must be affirmed.

ACKNOWLEDGMENT OR NEW PROMISE TO SUSPEND THE RUNNING OR REMOVE THE BAR OF THE STATUTE OF LIMITATIONS.

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I. General Effect of Acknowledgment or New Promise.

The statutes of limitation have always been a most fruitful source of doubt and discussion, and the decisions in regard to them have always been more or less conflicting. Hence, whenever it has been found that the question presented in the particular case under consideration has been settled by the adjudications of the appellate court of the state wherein the case is presented, those adjudications are deemed controlling regardless of the character of the adjudications elsewhere: *Qnynn v. Carroll*, 10 Md. 208; *Tridell v. Munhall*, 124 Fed. 802. In most all of the states the revised codes have provisions based upon the statute of 9 George IV, chapter 14, which took the place of the ancient statute of James. These code provisions are generally to the effect that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby the case is taken out of the operation of the statutes of limitation, unless the same be contained in some writing signed by the party to be charged thereby. The code provisions do not, however, change the effect of the general decisions upon the subject save as to the necessity of the writing and the signature of the party. The moral obligation to pay a debt barred by limitations is held to be a sufficient consideration for a new promise to pay it: *Koons v. Vancasant*, 129 Mich. 260, 95 Am. St. Rep. 438, 88 N. W. 630. Hence an acknowledgment or new promise is deemed a new contract springing out of and supported by the original consideration: *Ten Eyck v. Wing*, 1 Mich. 40; *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799. And it also follows that it is not the mere acknowledgment which renews or revives the debt, but the new promise of which the acknowledgment is merely the evidence: *Krebs v. Olmstead*, 137 Mass. 504. The general rule was stated by Lord Justice Mellish in *Mitchell's Claim*, L. R. 6 Ch. 822, 828, in the following concise words: "There must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Much of the confusion in regard to the subject has arisen from the failure to always consider the real purpose of the acknowledgment, and of course many conflicting decisions arise as to what words in an acknowledgment constitute a new promise. It seems to us, however, that the words constituting the acknowledgment should be construed in the same manner as the words in any other kind of a contract. In *Tridell v. Munhall*, 124 Fed. 802, it was held that an acknowledgment is only effective because of the implied promise to pay. Where, therefore, it is accompanied by an express promise as to how a debt is to be paid, there can be no implication outside of it; a conditional

promise to pay is not sufficient, though accompanied with an express acknowledgment and a payment on account, without proof that the condition has been fulfilled. Chancellor Kent, in *Roosevelt v. Mark*, 6 Johns. Ch. 290, said that it was the new promise which takes the case out of the statute, and that the acknowledgment is evidence of the new promise, but if it be qualified so as to repel the presumption of the promise to pay, it is not evidence of a promise. That view has been asserted by other courts, among which are *Evans v. Carey*, 29 Ala. 99; *Sanford v. Clark*, 29 Conn. 457; *Black v. Reybold*, 3 Harr. 528; *Ennis v. Pullman etc. Co.*, 165 Ill. 161, 46 N. E. 439; *McLean v. Thorp*, 4 Mo. 256; *Atwood v. Coburn*, 4 N. H. 315; *Danforth v. Culver*, 11 Johns. 146, 6 Am. Dec. 361; *Johnson v. Beardalee*, 15 Johns. 3; *Belote v. Winne*, 7 Yerg. 534; *Bowker v. Harris*, 30 Vt. 424; *Clementson v. Williams*, 8 Cranch, 72, 3 L. ed. 491. In *Custy v. Donlan*, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360, it was held that a new promise is implied from a general unqualified acknowledgment of a debt. In *Shipley v. Shilling*, 66 Md. 563, 8 Atl. 355, the court said: "The principle is now well settled, in this state at least, that where a debt is admitted to be due, the law raises, by implication, a promise to pay it; and it is, therefore, immaterial whether the promise be made in express terms or be deduced from an acknowledgment as a legal implication; as in either case the effect is the removal of the bar of the statute and the restoration of the remedy on the original demand." There seems to be some confusion as to the effect of an acknowledgment or new promise made before the debt has become barred and when made after the debt has become barred. In *Harrell v. Davis*, 108 Ga. 789, 33 S. E. 852, a written acknowledgment of an existing liability was held equivalent to a new promise, and to constitute a new point from which the statute of limitations begins to run. And in *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42, it was held that the effect of an acknowledgment is to place the debt upon the footing of one contracted at the time of such acknowledgment. The distinction between an acknowledgment before and after the running of the statute consists merely in its effect upon the debt and the remedy. An acknowledgment or promise before the statute has run imparts vitality to the old debt for another statutory period commencing from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action based on the promise, express or implied, on which the old debt is the consideration: *Carr v. Robinson*, 8 Bush, 274. So, also, in *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145, the same distinction was also noted. Chief Justice Beatty, in giving the reasons for the distinction, said: "On principle, this distinction must exist. When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new; he

merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end by reason of the lapse of the full period of limitation or of a discharge in bankruptcy, a new promise creates a new obligation and is itself the basis of the action": See, also, *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42, to the same effect. This distinction was also recognized in the earlier decisions of South Carolina: See *Brown v. Joyner*, 1 Rich. 210; *De Loach v. Turner*, 6 Rich. 117; *Young v. Monpoeny*, 2 Bail. 278; *Bucker v. Frazier*, 4 Strob. 95; *Lee v. Perry*, 3 McCord, 552, 15 Am. Dec. 650.

II. Persons to Whom Acknowledgment Must be Made.

The decisions touching the question as to whom the acknowledgment or new promise must be made in order to be effective, have in the past been very conflicting, and they are by no means entirely harmonious at the present time except in so far as the matter is regulated by statute. The court in *Allen v. Collier*, 70 Mo. 138, 35 Am. Rep. 416, in holding that an acknowledgment contained in a writing, found after the death of the debtor among his papers, signed by him and purporting to be his will, but never attested, was not sufficient to interrupt the running of limitations, said: "There is a conflict of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound, if made to a stranger, would be sufficient to take a case from under the operation of the statute of limitations, but there is no conflict as to the necessity for such promise or acknowledgment being made to some person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee." So, also, in *Parker v. Remington*, 15 R. I. 300, 2 Am. St. Rep. 897, 3 Atl. 590, it was held that an acknowledgment of a debt to a stranger, and not intended to be communicated to the creditor, will not remove the bar of the statute of limitations. The court, in that case, said: "The older cases, both English and American, hold that an acknowledgment of a debt to a stranger is as effectual to remove the bar of the statute as one made to the creditor; but the later cases, both English and American, strongly maintain that an acknowledgment to a mere stranger is ineffectual to remove the bar, unless it was intended to be communicated to the creditor, the reason being that otherwise no privity is established between the parties in respect to the new promise"; citing *Wood on Limitations*, sec. 79; 1 *Smith's Lead. Cas.* 726; *Bloomfield v. Bloomfield*, 7 Ill. App. 261; *Parker v. Schuford*, 76 N. C. 219; *Bachman v. Roller*, 9 Bart. 409, 40 Am. Rep. 97; *Edwards v. Culley*, 4 Hurl. & N. 377; *Fuller v. Redman*, 26 Beav. 614. See, also, *Matter of Kendrick*, 107 N. Y. 104, 13 N. E. 762, to the same effect. In *McKinney v. Synder*, 78 Pa. St. 497, the court very pertinently remarked: "A promise

made to a stranger is a mere declaration of intention which the promisor may change at pleasure." In *Houston v. Jankowskie*, 76 Tex. 368, 18 Am. St. Rep. 57, 13 S. W. 369, it was held that the acknowledgment must be made to the person holding the claim, or his representative and not to a stranger. The same rule was substantially asserted in *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67. In *Spangler v. Spangler*, 122 Pa. St. 358, 9 Am. St. Rep. 114, 15 Atl. 436, it was held that the promise to pay a debt barred by the statute of limitations must be made to the party interested or to his agent, and hence evidence that the debtor stated to a stranger that he had acknowledged the indebtedness to his creditor and promised to pay it is not a promise made to the creditor or his agent. But an acknowledgment made to a stranger may be proved in corroboration of one to the creditor: *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Paty v. Davis*, 12 Lea, 286. It was, however, held in *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081, that where the defendant sent for plaintiff's sister and requested her to tell plaintiff that he would pay every cent he owed him, she was defendant's agent for that purpose; consequently the promise was not made to a stranger. But in *Wolford v. Cook*, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706, it was held that a creditor cannot be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself. In *Abercrombie v. Butts*, 72 Ga. 74, 53 Am. Rep. 832, a memorandum in the handwriting of the debtor but unsigned and found among his papers after his death, was held not a sufficient acknowledgment to take the debt out of the statute. So, also, in *Merriam v. Leonard*, 6 Cush. 151, an acknowledgment of a debt contained in an undelivered mortgage found after the mortgagor's death among his papers was held insufficient as an acknowledgment. In *Stewart v. Garrett*, 65 Md. 392, 57 Am. Rep. 333, 5 Atl. 324, the court, in holding that an acknowledgment made to a stranger would toll the statute, gave its reasons in the following language: "It has been held, we are aware, in some states that the acknowledgment must be made to the party or his agent. The decisions in these cases proceed on the principle that the debt is extinguished by operation of the statute, and the action is brought on the new promise, and it is necessary, therefore, that the acknowledgment should be made to the contracting parties. The debt, however, is not in this state extinguished by the operation of the statute—it affects only the remedy. This suit is brought on the original cause of action, and the new promise is offered in evidence to remove the bar of the statute."

The question would, therefore, seem to depend on the manner in which statutes of limitations are viewed with respect to their effect upon the original demand, though it would by no means be free from difficulty, no matter whether the cause of action based on an

acknowledgment of the debt after the bar of limitations, be deemed as arising on the implied promise, or whether the cause of action based on an acknowledgment before the debt had become barred be deemed as arising on the original demand. It would seem that where the cause of action is based on the promise and not on the original demand that the promise should have been made to a party competent to represent the creditor. But where the cause of action is based on the original demand, the necessity for such a competent contracting party is not so apparent. The weight of authority seems to be to the effect that the acknowledgment or new promise must be made to the creditor, or his agent, and not to a stranger. Among the authorities so holding, see *Ringo v. Brooks*, 26 Ark. 540; *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Carroll v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280; *Trousdale v. Anderson*, 72 Ky. (9 Bush) 276; *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557; *Williamson v. Williamson*, 50 Mo. App. 194; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Bloodgood v. Bruen*, 8 N. Y. 362; *Fletcher v. Updike*, 3 Hun, 350; *Hussey v. Kirkman*, 95 N. C. 68; *Parker v. Shuford*, 76 N. C. 219; *Spangler v. Spangler*, 122 Pa. St. 358, 9 Am. St. Rep. 114, 15 Atl. 436; *Kyle v. Wells*, 17 Pa. St. 286; 55 Am. Dec. 555; *Trammel v. Salmon*, 2 Bail. 308; *Robbins v. Farley*, 2 Strob. 348; *Ft. Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. Rep. 56. Among those authorities which take the contrary view are *St. John v. Garrow*, 4 Port. 223, 29 Am. Dec. 280; *Newkirk v. Campbell*, 5 Harr. 380; *Succession of Harrell*, 3 La. Ann. 323; *Utz v. Utz*, 34 La. Ann. 752; *Oliver v. Gray*, 1 Har. & G. 204; *Stewart v. Garrett*, 65 Md. 392, 57 Am. Rep. 333, 5 Atl. 324; *Whitney v. Bigelow*, 4 Pick. 110; *Philips v. Peters*, 21 Barb. 351; *Mastin v. Branham*, 86 Mo. 643; *Collett v. Frazier*, 56 N. C. 80. Some of the authorities hold that the acknowledgment is sufficient to remove the bar if made to a third person with intent that it be made known to the creditor: See *Wakeman v. Sherman*, 9 N. Y. 85; *Parker v. Remington*, 15 R. I. 300, 2 Am. St. Rep. 897, 3 Atl. 590; *Bachman v. Roller*, 9 Baxt. 409, 40 Am. Rep. 97.

III. Time for Making Acknowledgment or New Promise.

It is generally immaterial whether the acknowledgment or new promise precedes or follows the bar of the statute of limitation: *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Ayers v. Richards*, 12 Ill. 146; *Harding v. Durand*, 36 Ill. App. 238; *Lindsey v. Lyman*, 37 Iowa, 206; *Carr v. Robinson*, 8 Bush, 269; *Little v. Blunt*, 16 Pick. 359; *Mastin v. Branham*, 86 Mo. 643; *Pickering v. Frink*, 62 N. H. 342; *Steel v. Steel*, 12 Pa. St. 64; *Yaw v. Kerr*, 47 Pa. St. 333; *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496. In *Newlin v. Duncan*, 1 Harr. 204, 25 Am. Dec. 66, an acknowledgment made after the action was brought was held to prevent the bar of the statute.

But in *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807, a case in which the complaint was framed so as to meet the defense of limitations, it was held that a letter written by the defendant to plaintiff after commencement of the action wherein he acknowledged the indebtedness sued on was not admissible for the purpose of avoiding the statute.

IV. General Requirements of the Acknowledgment or New Promise.

a. In General.—In *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28 L. ed. 636, it was said: "Statutes of limitations are statutes of repose and not merely statutes of presumption of payment. Therefore, to deprive a debtor of the benefit of such a statute by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular claim, and it must be shown to have been intentional." In *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174, the leading American case on the subject, Justice Story said: "In the case of *Wetzell v. Bussard*, 11 Wheat. 309, 6 L. ed. 481, the subject again came before this court, and the English and American authorities were deliberately examined. The court there expressly held that 'an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show, positively, that the debt is due in whole or in part. If it be connected with circumstances, which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown.' We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dan-

gers of being entrapped in careless conversations, and betrayed by perjuries. The authorities were also exhaustively reviewed by Justice Story in *Le Roy v. Crowninshield*, 2 Mason, 151, Fed Cas. No. 8269. In *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67, it was stated that a promise or acknowledgment relied upon to take a contract out of the statute of limitations must be in writing and must be a direct, distinct, unqualified and unconditional admission of the debt which the party is liable and willing to pay. And in *Macrum v. Marshall*, 129 Pa. St. 506, 15 Am. St. Rep. 730, 18 Atl. 640, it was stated that the acknowledgment must be clear and unambiguous, and must recognize and be directed to the debt with sufficient clearness to amount to an unqualified admission that it remains due and unpaid, and in *Durban v. Knowles*, 66 Kan. 397, 71 Pac. 829, it was said that an acknowledgment must be unequivocal and without qualifications, and a direct admission of a present existing liability. In *Lanier v. McCabe*, 2 Fla. 32, 48 Am. Dec. 173, it was held where a subsequent acknowledgment is relied on, it must be explicit and express. And in *Warren v. Cleveland*, 111 Tenn. 174, ante, p. 749, 76 S. W. 910, it was said that in order to remove the bar of limitations there must be either an express promise to pay or an acknowledgment of the debt accompanied by an expression of willingness to pay it. In *Davis v. Davis*, 98 Me. 135, 56 Atl. 588, under a statute requiring the acknowledgment or promise to be "express," it was held that a written acknowledgment or promise to pay a debt must be intentionally made for the purpose of removing the bar. In *Cann v. Cann*, 45 W. Va. 563, 31 S. E. 923, an undelivered duebill found among the debtor's effects after his death was held not to constitute a sufficient acknowledgment to avoid the statute of limitations. And in an early case in Wisconsin (*Pritchard v. Howell*, 1 Wis. 131, 60 Am. Dec. 363), it was said that in order for a promise to take a case out of the statute, the promise must be such as if original and made upon adequate consideration would of itself support an action.

b. *Necessity for Acknowledgment or New Promise to be in Writing.*—In most of the states the statutes require acknowledgments and new promises of the character under discussion to be in writing and signed by the party to be charged. In *Johnston v. Hussey*, 92 Me. 92, 42 Atl. 312, it was held, under a statute requiring the acknowledgment to be express, in writing and signed by the party to be charged, that the promise could not be read into the writing by means of oral evidence. In *San Antonio etc. Loan Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386, the court in construing a statute requiring such acknowledgments to be in writing, remarked that "the provision was intended to require them to be in writing where before they could have been oral, and not to restrict the power of parties to contract generally. The pur-

pose was only to require those things which had become known as acknowledgments of claims to be in writing." And in *Perkins v. Cheney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595, the court, remarking that at common law verbal acknowledgments were sufficient, construed the clause of the Michigan statute requiring written acknowledgments to apply only to those cases within the provisions of the general statute of limitations, and that as to cases not within its provisions, the common-law rule would prevail.

c. **What Constitutes a Writing Within the Statute.**—Letters written by the debtor to the creditor are generally the writings shown to prove the acknowledgment or new promise: *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579; *Yarbrough v. Gilland*, 77 Miss. 139, 24 South. 170. In *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998, it was held that the writing is sufficient if written at the direction of the debtor, even though not signed by him personally. And in *Re Deep River Nat. Bank*, 73 Conn. 341, 47 Atl. 675, a letter dictated to a stenographer, typewritten by the latter and signed with the name of the dictator by means of a rubber stamp, was held to be a writing signed by the person dictating the letter. In *Barnard v. Bartholomew*, 22 Pick. 291, it was said that the amount of the debt or date of the letter need not be in the writing, but could be supplied by other evidence. In *Goodrich v. Case*, 68 Ohio St. 187, 67 N. E. 295, the payee of the note died, and the note being old, the maker at the request of the executor delivered a true copy of the note to him and the original note was thereupon destroyed. The court held that the substituted note was not a written acknowledgment of the old note nor a promise in writing to pay the same. In *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309, letters were held to constitute a written acknowledgment of a debt due an estate, though addressed to the administrators as individuals, or though addressed to only one of two administrators. And in *Manchester v. Braedner*, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405, an order drawn by the debtor in favor of the creditor, requesting a third person to pay the creditor a sum named in such order was held a sufficient acknowledgment under the New York statute. In *Rowe v. Thompson*, 15 Abb. Pr. 377, it was held that there was a sufficient signing of an instrument, calculated to save the debt from the operation of the statute of limitations, if it is evident from any part of the instrument that the debtor named in it has given to it his assent. In *Blanchard v. Blanchard*, 122 Mass. 558, 23 Am. Rep. 397, there was an indorsement in the handwriting of the debtor, but not signed, of a payment of part of a promissory note. The court, however, held that it was not a sufficient writing to prevent the operation of the statute if no money or valuable consideration actually passed, even though it was orally agreed that the amount stated as having been paid be deemed a payment. In *McLaren v. McMartin*, 36 N. Y. 88, it was held that where the stat-

ute provides that the writing "be signed by the party to be charged thereby," the signing by any other party is not sufficient. In *Stiles v. Laurel Fork Oil etc. Co.*, 47 W. Va. 838, 35 S. E. 986, the court held that a stated account, not signed by the party, would not operate as an acknowledgment, and it also held that mere entries by a party in his own book of accounts would not constitute an acknowledgment which would defeat the statute.

d. Effect of Admissions in Judicial Proceedings.

1. In Affidavits or Pleadings or at the Trial.—As a general rule, admissions made in pleadings are not deemed sufficient to constitute an acknowledgment. Thus it was held in *Bradford v. Spyker*, 32 Ala. 134, that an admission in pleadings would not revive an action which was barred by the statute of limitations. And in *Holberg v. Jaffray*, 65 Miss. 526, 5 South. 94, an admission of a debt made in the answer to a bill to set aside an assignment made by the defendants and to vacate certain judgments confessed by them was held insufficient to constitute an acknowledgment. In *Commercial Mut. Ins. Co. v. Brett*, 44 Barb. 489, the plaintiff sued on certain promissory notes. Defendant, in his answer, admitted the making of the notes, but claimed that they were premium notes, and should be deducted from a certain loss sustained under the policy for which they were given. The court held that the admission did not amount to an acknowledgment, because no promise to pay them could be inferred therefrom, and the admission was not made voluntarily: See, also, *McMillan v. Leeds*, 58 Kan. 815, 49 Pac. 159, to the same effect. An answer by a garnishee was held insufficient in *Henkle v. Currin*, 2 Humph. 137. A statement by the defendant in a suit before a justice of the peace, that he would not take advantage of the statute of limitations was held insufficient as an acknowledgment in *Carruth v. Paige*, 22 Vt. 179. But in *Sumter v. Morse*, 3 Hill. Eq. (S. C.) 87, a case in which an administrator had filed a bill for an accounting, the court held the bill was sufficient to take the defendant's claim out of the statute. And in *Brigham v. Hutchins*, 27 Vt. 569, an acknowledgment of indebtedness made in the answer to a suit in equity was held sufficient to remove the bar. So, also, in *Roberts v. Leak*, 108 Ga. 806, 33 S. E. 995, an admission in a pleading which recognized a liability to a certain amount was held such a written acknowledgment of an existing liability as would remove the bar of limitations: See, also, *McMillan v. Toombs*, 74 Ga. 535, to the same effect. In *Bloodgood v. Bruen*, 8 N. Y. 362, it was held that an admission of indebtedness made while being a witness was not sufficient as an acknowledgment. And in *Lane v. Richardson*, 79 N. C. 159, the fact that one defendant suffered a default judgment to be entered against him was held no such acknowledgment as would bind his co-obligor. The case of *Goodwin v. Buzzell*, 35 Vt. 9, was somewhat similar. A debtor

was summoned as the trustee of his creditor; he denied any liability to the creditor and intended to appear and contest the question of his liability, but inadvertently failed to appear at the day of trial and judgment was rendered against him by default. He afterward paid the judgment. The court held that the rendition of judgment against him and his payment of the judgment were not such acknowledgment of the creditor's claim as would prevent the operation of the statute. In *Heyer v. Pruyn*, 7 Paige, 465, 34 Am. Dec. 355, suffering a foreclosure bill to be taken as confessed was held an admission of liability on the part of the mortgagor sufficient to take the case out of the statute where such an admission is necessary. In *Miffin v. Stalker*, 4 Kan. 283, a confession of judgment which was not signed by the defendant was held not such an acknowledgment as would toll the statute. In *Succession of Mansion*, 34 La. Ann. 1246, a confession of judgment by an executrix was held sufficient to stop the running of prescription during the settlement of the estate. In *Bank of Newbern v. Sneed*, 10 N. C. 500, defendant made an affidavit for a continuance in which he stated "that the action was founded on his guaranty, and by the absent witness he expected to prove such laches on the part of the plaintiff as to discharge him from his engagement." The court held that the affidavit did not amount to an acknowledgment. In *Dinguid v. Schoolfield*, 32 Gratt. 803, a deposition by the maker of a note used in a case in which the payee of the note was not a party was held sufficient to defeat the plea of limitations made by him in a suit on the note.

2. In Inventories or Schedules in Administration or Bankruptcy Proceedings.—The inclusion of a barred claim against an estate in the inventory of an administrator or executor has sometimes been held to constitute an acknowledgment sufficient to revive it: *Berens v. Boutte*, 31 La. Ann. 112; *Porter v. Hornsby*, 32 La. Ann. 337; *Troendle v. De Bouchel*, 33 La. Ann. 753; *Morrow v. Morrow*, 12 Hun, 386; *Clark v. Van Amburgh*, 14 Hun, 557; *In re Robbins' Estate*, 7 Misc. Rep. 264, 27 N. Y. Supp. 1009. But the contrary has also been held: *Everitt v. Williams*, 45 N. J. L. 140; *In re Kendrick*, 107 N. Y. 104, 13 N. E. 762, the administrator petitioned for a settlement of his accounts, and pursuant to the code requirement set forth the names of the persons interested in the estate as creditors, etc., and named one "Wesley, a judgment creditor of the deceased," without specifying the amount of the judgment, the date of its recovery or that there was any amount due thereon. The account filed with the petition showed that the judgment claim was disputed by the administrator. The court held it insufficient to constitute an acknowledgment. In *Woodlief v. Bragg*, 108 N. C. 371, 13 S. E. 211, the filing of a petition to apply proceeds from the sale of certain real estate to the payment of a claim was held suf-

ficient to constitute an acknowledgment. The inclusion of a barred debt due to the decedent from the administrator or executor in the inventory of the estate has been held to constitute an acknowledgment sufficient to remove the bar of limitations: *Ross v. Ross*, 6 Hun, 80; *In re Daggett*, 1 Misc. Rep. 248, 22 N. Y. Supp. 911, affirmed in 75 Hun, 612, 28 N. Y. Supp. 1127. But the contrary view was held in *In re Bell's Estate*, 25 Pa. St. 92; *Black v. White*, 13 S. C. 37.

The insertion of a barred debt in insolvency or bankruptcy proceedings is not considered such an acknowledgment as implies a new promise to pay the debt: *Richardson v. Thomas*, 13 Gray, 381, 74 Am. Dec. 636; *Christy v. Flemington*, 10 Pa. St. 129, 49 Am. Dec. 590; *Hidden v. Cozzens*, 2 R. I. 401, 60 Am. Dec. 93; *Georgia Ins. Co. v. Ellicott*, Taney (U. S.), 130, Fed. Cas. No. 5354. The court in *Christy v. Flemington*, 10 Pa. St. 129, 49 Am. Dec. 590, in support of its holding said: "We must consider the object and design of the schedule, in order to ascertain the value and intent of this acknowledgment. The whole import of the proceeding is an assertion on the part of the applicant that he is unable to pay his debts, but is willing to transfer his property to trustees for the benefit of his creditors, to be distributed pro rata. He is bound to furnish a list, so that it may be so distributed. The schedule is also designed for his protection from subsequent arrest by creditors therein named. This acknowledgment, therefore, is nothing more than an admission of the debt, accompanied with a declaration that the debtor is unable to pay." And in *Richardson v. Thomas*, 13 Gray, 381, 74 Am. Dec. 636, the court adverted to the fact that an acknowledgment must be made voluntarily in order to imply a promise to pay, and then suggested the question, "Can such an inference be drawn from an acknowledgment, which the debtor is bound by a legal requisition, under a heavy penalty, to make, and as a step in the course of a series of legal proceedings, which, when rightly conducted, is designed to lead, as one of its appropriate objects, to the discharge of that very debt?"

e. **Effect of Testamentary Provisions Regarding the Debt.**—A general clause in a will directing all just debts of the testator to be paid is insufficient as an acknowledgment to revive a debt barred by the statutes of limitation: *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Martin v. Gage*, 9 N. Y. 398. In the case of *Roosevelt v. Mark*, 6 Johns. Ch. 266, the opinion was delivered by Chancellor Kent, who exhaustively reviewed the early English cases which apparently affirmed a contrary doctrine. The rule was amplified in *Agnew v. Fetterman*, 4 Pa. St. 56, 45 Am. Dec. 671, where it was stated that a testamentary trust for the payment of the testator's debts does not revive debts barred by the statutes of limitation, but if such trust be not merely im-

plied but express, precise and clear, it suspends the statute on debts due but not barred at the death of the testator: See, also, *Reed v. Marshall*, 90 Pa. St. 345, to the same effect. In *Miller v. Simons*, 71 Ill. App. 369, a clause in a will directing the executors to take certain steps to pay testator's debt to his son, together with a memorandum in the testator's handwriting reciting the transactions had between himself and his son, and stating the amount due the son, were held sufficient to prevent the bar of the statute.

2. *Necessity for the Acknowledgment or New Promise to be Definite and Certain.*—In order to take a demand from the operation of the statute of limitations, an acknowledgment should be clear and explicit in relation to the subject or demand to which it refers: *Conway v. Reyburn*, 22 Ark. 290; *Martin v. Roach*, 6 Ga. 21, 50 Am. Dec. 306; *Clarke v. Dutcher*, 9 Cow. 674; *Burr v. Burr*, 26 Pa. St. 284; *Arey v. Stephenson*, 11 Ired. (33 N. C.) 86; *Robbins v. Farley*, 2 Strob. 348. Although the rule is one which appears to be reasonable, still the courts have been obliged to frequently repeat it. It has been stated in various forms. In *Conway v. Williams*, 10 La. 568, 29 Am. Dec. 466, it was said that a general acknowledgment of indebtedness without specifying the nature or extent thereof was insufficient. In *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093, loose and general expressions, which are merely casual, respecting acknowledgment of a debt, were said to be insufficient to remove the bar. In *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 306, the court entered into a very elaborate review of the cases on the subject, and set forth the reasons for the holding which it made. It held that the acknowledgment must specify or plainly refer to the particular demand or cause of action where an account exists, consisting of various disconnected items. In *Davis v. Steiner*, 14 Pa. St. 275, 53 Am. Dec. 547, the court remarked that the acknowledgment need not refer to the amount of the debt, but that there must be no uncertainty in it as to the debt referred to. And in *Landis v. Roth*, 109 Pa. St. 621, 58 Am. Rep. 747, 1 Atl. 49, the court held that in order for a new promise to revive a debt against which the statute had run, it must identify the debt explicitly and certainly. So, also, it is said that an acknowledgment must contain a clean and unequivocal admission of the debt, a specification of the amount due or a reference to something by which the amount can be definitely and certainly ascertained, together with an express or implied promise to pay: *Webster v. Newbold*, 41 Pa. St. 482, 82 Am. Dec. 487; *Willer v. Baschore*, 83 Pa. St. 356, 24 Am. Rep. 187; *Ward v. Jack*, 172 Pa. St. 416, 51 Am. St. Rep. 744, 33 Atl. 577. In *Waldron v. Alexander*, 136 Ill. 550, 27 N. E. 41, it was said that the acknowledgment and promise to pay, in order to be sufficient, must arise out of facts which identify the debt with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it. And in

Stiles v. Laurel Fork Oil etc. Co., 47 W. Va. 338, 35 S. E. 986, the court observed that an acknowledgment in writing must be clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in anywise conditional, nor by way of compromise or attempt at settlement. And the court, in *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416, stated that a written acknowledgment must clearly identify the particular account to be renewed and contain either an express promise to pay or such an absolute admission of it as an existing debt as would imply a promise. And in *Paille v. Plant*, 109 Ga. 247, 34 S. E. 274, it was said that a promise in writing must plainly and unmistakably refer to the debt. In another Georgia case (*Slack v. Sexton*, 113 Ga. 617, 38 S. E. 946), it was held that letters, in order to remove the bar, must with reasonable certainty of themselves connect the debt with the promise and sufficiently identify the debt. They must by their words acknowledge the particular debt as an existing liability. And in *Richards v. Hayden*, 8 Kan. App. 816, 57 Pac. 978, it was held that a written acknowledgment must be unqualified and direct and not dependent for its meaning on some other writing or on a possible construction of its own language. In *Will v. Marker*, 122 Iowa, 627, 98 N. W. 487, the court observed, in construing the statute requiring such acknowledgments or promises to be contained in a writing signed by the party to be charged, that it was not necessary that a writing should expressly admit that a note was unpaid, but it is enough if it clearly and unequivocally refers to the note: See, also, *Campbell v. Campbell*, 118 Iowa, 131, 91 N. W. 804; *McConaughy v. Wilsey*, 115 Iowa, 589, 88 N. W. 1101, to the same general effect. It was held in *Alexander v. Muse* (Tenn.), 79 S. W. 117, that a mortgage or deed of trust cannot be extended by merely referring to it in a note as being still in force. The rule that the acknowledgment must be definite and certain has been illustrated in many of the adjudications of the courts. Thus in *Nelson v. Hanson*, 92 Iowa, 356, 54 Am. St. Rep. 568, 60 N. W. 655, the maker of a note in response to a letter inquiring whether he intended to settle the note which the writer held against him, answered that he will pay what he can and what is right. The court held that the answer was not sufficiently clear and unqualified to be a new promise or an admission of indebtedness. And in *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67, the suit was in relation to an absolute and unconditional guaranty. The court held that a written admission of one of the guarantors of the existing indebtedness of the corporation for which the guaranty was given, but which did not refer in any manner to the contract of guaranty, did not remove the bar. A mere general admission that "I owe him something," without saying how much or for what, was held insufficient in *Pray v. Garcelon*, 17 Me. 145. In *Harms v. Freytag*, 59 Neb. 359, 80 N. W. 1039, the surety on a note wrote a letter describing the note in which

he requested the payee to collect the money due on it, saying that he "will no longer be held good for the note" in case it is not promptly collected. The court held it to be a sufficient acknowledgment. And in *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081, it was said that a promise by the defendant to pay the plaintiff every cent he owed him, sufficiently identified the debt in the absence of proof that there is any debt or account between the parties other than the one sued on. In *Campbell v. Campbell*, 118 Iowa, 181, 91 N. W. 894, it was held that where the payor of a note in inclosing a draft says in reference to it: "Which I think pays the interest on my note," and the brother and mother to whom the letter was addressed have no other written obligation of the writers, the letter amounts to an acknowledgment sufficient to revive the note.

An agreement promising to pay all the notes and bills held by the creditor at the time of the agreement "as shown by the same and in the manner shown by the same," and admitting that they are unpaid, was held in *Pollak v. Billing*, 131 Ala. 519, 32 South. 689, sufficient to remove the bar, inasmuch as it furnished the means of ascertaining with definiteness the amount of the indebtedness. In *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540, a letter referring to an indebtedness upon which a certain payment had been made with an unqualified promise to pay the balance of the debt, was held a sufficient acknowledgment. And in *Yarbrongh v. Gilland*, 77 Miss. 139, 24 South. 170, a statement in a letter to the effect that the writer owes the party addressed "Merchandise, \$109.60," fixing the date on which the merchandise was purchased, was said to sufficiently specify the articles. In *C. H. Albers Com. Co. v. Sessel*, 87 Ill. App. 378, statements that the reason an account was not settled in full was that the writer was making a bare living out of his insurance business; that he did not have any money outside of that, and could not pay, only as he could in that way, and that the account was all right, but he could not pay anything, were held too vague and indefinite to revive the debt. And in a late case in Michigan—that of *Carr v. Carr* (Mich.), 101 N. W. 550—a mortgagee claiming an indebtedness of five thousand six hundred and ninety-four dollars wrote the mortgagor that if he would pay one hundred and ten pounds, the mortgagee would forgive the rest; the mortgagor thereupon wrote a letter accepting the proposition, and requesting him to forward the necessary papers. This letter was followed by other correspondence relating to the settlement upon the one hundred and ten pound basis. The court held that there was no such recognition of the entire amount claimed, and no promise to pay sufficient to prevent the running of the statute. So, also, in *Rudolph v. Sellers*, 106 Ga. 485, 32 S. E. 599, a letter merely referring to an account on which the writer has been sued, without any promise to pay or an acknowledgment of liability, was held insufficient to remove the bar. In *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579, a letter acknowledging the indebtedness on a note and promising "that every cent I

owe you will be paid," was held sufficient to support the running of the statute.

g. Necessity for an Express or Implied Promise to Pay.

1. **Necessity for Existing Liability to be Admitted.**—It seems to be the rule that in order for an acknowledgment to suspend or remove the operation of the statute of limitations, it must contain an admission or recognition of the debt as an existing obligation, and contain nothing inconsistent with an intention on the part of the debtor to pay it: *Brown v. State Bank*, 10 Ark. 134; *Hazzard v. Wright*, 2 *Houst.* 42; *Newlin v. Duncan*, 1 *Harr.* 204, 25 *Am. Dec.* 66; *Thornton v. Nichols*, 119 *Ga.* 50, 45 *S. E.* 785; *Carroll v. Forsyth*, 69 *Ill.* 129; *Wetz v. Greffe*, 71 *Ill. App.* 313; *Chambers v. Garland*, 3 *G. Greene*, 322; *Hanson v. Towle*, 19 *Kan.* 273; *Frey v. Kirk*, 4 *Gill & J.* 509, 23 *Am. Dec.* 581; *Chambers v. Rubey*, 47 *Mo.* 99, 4 *Am. Rep.* 318; *Bucker v. Korff's Estate (Neb.)*, 97 *N. W.* 804; *Sherman v. Wakeman*, 11 *Barb.* 254; *Manchester v. Braedner*, 107 *N. Y.* 346, 1 *Am. St. Rep.* 829, 14 *N. E.* 405; *McClelland v. West*, 59 *Pa. St.* 487; *Smith v. Fly*, 24 *Tex.* 345, 76 *Am. Dec.* 109. A mere admission that the debt was once due is not sufficient: *Kelly v. Strouse*, 116 *Ga.* 872, 43 *S. E.* 280. In *Johnson v. Evans*, 8 *Gill*, 155, 50 *Am. Dec.* 669, an acknowledgment of a debt without a refusal to pay or an excuse for not paying it was held sufficient to remove the bar. And in *Custy v. Donlan*, 159 *Mass.* 245, 38 *Am. St. Rep.* 419, 34 *N. E.* 360, a receipt stating that the person signing it had at various times received of another person designated therein a sum of money also designated, "which is hereby acknowledged," was held an unqualified acknowledgment of the debt as existing. In *Elder v. Dyer*, 26 *Kan.* 604, 40 *Am. Rep.* 320, one of the joint makers of a note wrote to the holder suggesting that he proceed against his comaker, saying, "I do not want to be held longer on the note." The court held that it constituted an "acknowledgment of an existing liability" within the statute.

2. **Effect of Mere Acknowledgment.**—In order for an acknowledgment to operate as a suspension or removal of the bar of the statute of limitations, the acknowledgment must be such that an implied promise to pay the debt may be inferred therefrom: *Frey v. Kirk*, 4 *Gill & J.* 509, 23 *Am. Dec.* 581. A mere acknowledgment of the debt without such circumstances that a promise to pay may be inferred is insufficient: *Bullion etc. Bank v. Hegler*, 93 *Fed.* 890. Some of the courts state that in order to remove the bar of the statute there must not only be an acknowledgment of the debt as existing, but an expression of willingness to pay it: *Simonton v. Clark*, 65 *N. C.* 525, 6 *Am. Rep.* 752; *Kensington Bank v. Patton*, 14 *Pa. St.* 479, 53 *Am. Dec.* 564; *Coles v. Kelsey*, 2 *Tex.* 541, 47 *Am. Dec.* 661; *Brainard v. Buck*, 25 *Vt.* 573, 60 *Am. Dec.* 291. In *Hahn v. Gates*, 102 *Ill. App.* 385, it was said that an acknowledgment of the debt and the amount due without a promise to pay or anything said or

done from which it could be inferred that the debtor intended at any future time to pay, is insufficient to remove the bar. In *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163, it was stated that the acknowledgment must be of a subsisting debt, with a willingness to pay it, or at least no avowed determination to the contrary. And it has been stated that an acknowledgment that a debt exists without any promise to pay or expression of willingness to remain bound will toll the statute in the absence of conditions or circumstances rebutting the presumption of an intention to pay: *Chidsey v. Powell*, 91 Mo. 622, 60 Am. Rep. 267, 4 S. W. 446. Some courts announce in a general way that an acknowledgment of a debt is sufficient to take it out of the operation of the statute although there has been no new promise: *Glenn v. McCullough*, Harp. (S. C.) 484, 18 Am. Dec. 661; *Palmer v. Gillespie*, 95 Pa. St. 340, 40 Am. Rep. 657. In a late case in Pennsylvania it was said that an admission sufficient to take a debt out of the statute of limitations must be an unequivocal acknowledgment of the debt and be consistent with the promise to pay: *Henry v. Zurlick*, 203 Pa. St. 440, 53 Atl. 243. An acknowledgment that the debt once existed accompanied by a refusal to pay it or a denial of present liability for its payment is generally held insufficient to toll the statute: *Tillett v. Linsey*, 6 J. J. Marsh. 357; *Gray v. McDowell*, 6 Bush, 475; *Thayer v. Mills*, 14 Me. 300; *Davidson v. Morris*, 5 Smedes & M. 564; *Buckner v. Johnson*, 4 Mo. 100; *Kirkbride v. Gash*, 34 Mo. App. 256; *Manning v. Wheeler*, 13 N. H. 486; *Belles v. Belles*, 12 N. J. L. 339; *Laurence v. Hopkins*, 13 Johns. 238; *Lee v. Polk*, 4 McCord, 215; *Galpin v. Barney*, 37 Vt. 627. But it has sometimes been held that an acknowledgment of the debt will be sufficient to toll the statute though accompanied by a refusal to pay it or expressions of inability to do so: *Penley v. Waterhouse*, 3 Iowa, 418; *Oliver v. Gray*, 1 Har. & G. 204; *Felty v. Young*, 18 Md. 163; *Cobham v. Mosely*, 3 N. C. 6; *Aiken v. Benton*, 2 Brev. 330. In *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309, letters by a debtor acknowledging a note, but not expressing any intent not to pay it were held a sufficient acknowledgment, though they expressed an expectation to pay from the proceeds of certain property, but did not contain an unconditional promise to pay. In *Pritchard v. Howell*, 1 Wis. 131, 60 Am. Dec. 363, the court in construing the statutory provisions regarding such acknowledgments said: "The mandate of the statute is, that these actions shall be commenced within six years, and 'not afterward.' How is this prohibition to be avoided? One would suppose that nothing short of an equivalent to a new cause of action arising within six years. Or, in other words, a new, unqualified promise—such a promise as, if original, and made upon adequate consideration, would of itself support an action, certainly not acknowledgments and admissions, such as are merely evidence of a promise, but not a promise itself. We are not disposed to deny, but, on the contrary, cheerfully admit, that the moral obligation of the original

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contract may be a sufficient consideration to support a new promise. But the latter should be indeed a promise, not the evidence merely from which it may be inferred." But the weight of authority would seem to sustain the proposition that the mere acknowledgment of a subsisting debt will toll the statute without an express promise to pay since the acknowledgment of the subsisting debt supported by the moral consideration arising from the original debt itself is said to imply a promise to pay: See *Burton v. Wharton*, 4 Harr. 296; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; *Shackleford v. Douglas*, 31 Miss. 95; *Elliott v. Leake*, 5 Mo. 208, 32 Am. Dec. 314; *Laurence v. Hopkins*, 13 Johns. 288; *Sherman v. Wakeman*, 11 Barb. 254; *Johns v. Lantz*, 63 Pa. St. 324; *Palmer v. Gillespie*, 95 Pa. St. 340, 40 Am. Rep. 657; *Georgia Ins. etc. Co. v. Ellicott, Taney* (U. S.), 180, Fed. Cas. No. 5354. Most of the cases which will be adverted to in the following section are cases in which the question adjudicated was whether the words used in the alleged acknowledgment constituted an implied promise to pay the original debt.

3. What Constitutes an Express or Implied Promise to Pay.

A. In General.—The decisions in regard to what form of acknowledgment constitutes an implied promise to pay a debt are not harmonious. Indeed, the decisions are not harmonious as to whether an implied promise is sufficient to remove the bar of limitations. The court in *Kyle v. Wells*, 17 Pa. St. 286, 55 Am. Dec. 555, in discussing the effect of such implied promise, said: "When a claim is barred by the statute of limitations, it ceases to be a legal claim, and becomes a mere moral right. The duty is not discharged; but the remedy is transferred from the forum of the law to the forum of conscience. But because in some hard cases this latter forum has refused relief, the law was stretched and the province of morality invaded, by deciding that a moral duty, followed by a promise, became a legal duty; and now such is the law though the reasoning is inconsequential. Hence it has become the rule that the legal right is restored by a new promise, or by admissions from which a new promise can properly be inferred. This is now the unquestioned rule on this subject, and if there be inconsistent decisions in applying the rule, the importance of resorting to the standard itself, rather than to imperfect copies, is the more manifest." Perhaps many of the apparently conflicting decisions on this subject are the result of different theories as to the effect of the statute of limitations upon the debt itself—namely, as to whether the statute operates as an extinguishment of the debt or whether it merely bars the remedy. It would seem that if the debt be extinguished, that the original debt could not very well be taken as the moving consideration for the promise to pay it after the bar of the statute had become operative. In *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170, the court said: "The promise may be either express or implied. Section 31 of the statute of limitations provides two modes in which the promise may be proved—

the one by producing the promise itself, the express promise, and the other by the production of the acknowledgment from which the promise is implied. The acknowledgment serves no other purpose than that, and there are no other means by which the implied promise may be proved. When the express promise is shown, the acknowledgment, if there be one, has no effect, for the law will not imply a promise in the presence of an express promise covering the same ground. The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt, in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay"; citing *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Sands v. Gelston*, 15 Johns. 511; *Jones v. Moore*, 5 Binn. 578, 6 Am. Dec. 428; *Berghans v. Calhoun*, 6 Watts, 219; *De Forest v. Hunt*, 8 Conn. 185; *Russell v. Copp*, 3 N. H. 154; *Harrison v. Handley*, 1 Bibb, 443; *Bell v. Rowland*, Hard. 301, 3 Am. Dec. 729. In *Young v. Monpoe*, 2 Bail. 278, the rule was laid down that a distinction should be made between cases, where at the time of the alleged acknowledgment the debt was already barred, and those where it was not; that in cases of the latter class a very slight admission of the debt would prevent the running of the statute, but that in cases of the other class, in order to remove the bar of the statute there must either be an express promise to pay, or an equivocal admission, unaccompanied by any expression indicating an intention not to pay. In *Coleman v. Forbes*, 22 Pa. St. 156, 60 Am. Dec. 75, it was said that to remove the bar of the statute of limitations there must be a new promise or circumstances from which one may be inferred. So, also, it is said that a promise may be implied from an unqualified admission that the debt is due and unpaid: *Freeman v. Walker*, 67 Ill. App. 302; *Whiteman v. McFarland*, 68 Ill. App. 295. And in *Olcott v. Scales*, 3 Vt. 173, 21 Am. Dec. 585, an acknowledgment of the debt in terms admitting it to be due, and assigning poverty as a reason for non-payment was held sufficient to remove the bar. In *Westinghouse Co. v. Boyle*, 126 Mich. 677, 86 Am. St. Rep. 570, 86 N. W. 136, indorsement of payment on a promissory note was held not to be evidence of a new promise, nor to interrupt the running of the statute of limitations if the payment resulted merely from crediting on the note a sum realized from the sale of property under a chattel mortgage. In *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162, a new promise made in ignorance of the fact that the promisor is legally discharged from all liability was held insufficient. See, also, *Warder v. Tucker*, 7 Mass. 449, 5 Am. Dec. 62, as bearing on the subject.

B. Acts or Writings Held to Show an Acknowledgment or New Promise to Pay.—In *Abrahams v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692, a debtor wrote: "You shall be paid as I get the money over and above my bread and meat; if I get the money, I will then pay
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you. I have acknowledged the debt to you in my letters, again and again, and therefore it stands as good as if you had my bond." The court held that the words constituted an acknowledgment and promise sufficient to remove the bar. In *Blakeman v. Fonda*, 41 Conn. 561, the debtor said: "If you will call in two weeks I will pay you something on the debt; I cannot tell how much." The court held the words were an unqualified recognition of the debtor's liability to pay the whole debt. The words, "I will pay it as soon as possible," were held sufficient to revive a barred debt in *Norton v. Shepard*, 48 Conn. 141, 40 Am. Rep. 157. And in *Cummings v. Gassett*, 19 Vt. 508, the promise was to pay "as soon as I can"; the words were held sufficient to remove the bar. So, also, in *Beeler v. Clarke*, 90 Md. 221, 78 Am. St. Rep. 439, 44 Atl. 1038, the maker of a note on its being presented to him for payment, admitted having signed it, but said: "I cannot pay it now, as I have two members of my family now to support." It was held sufficient to imply a promise to pay. In *Jenckes v. Rice*, 119 Iowa, 451, 93 N. W. 384, the maker of an indemnity contract in the form of a note wrote the payee: "I cannot tell where I can get money enough to pay the note, but as true as God, I will send it as soon as I can get it." The court held the letter to constitute a new promise. So, also, in *Vogelsang v. Taylor* (Tex. Civ.), 80 S. W. 637, letters to the payee of a note stating the writer's want of means, his intention to pay when he could, and offering to give a horse in part payment, were held an acknowledgment. In *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595, statements in letters concerning a note to the effect that the writer would pay when he was able, that he expected a raise of salary, and that he had other indebtedness to which he felt he must give a preference, were held not to be a mere conditional promise. In *De Forest v. Hunt*, 8 Conn. 179, the plaintiff wrote to defendant asking if an account previously sent him was correct, and what were the prospects of receiving payment. The debtor replied: "I am sorry to inform you that the prospects, at present, is not very flattering, as it is utterly out of my power to pay anything." It was held an unqualified acknowledgment. In *First Congregational Soc. v. Miller*, 15 N. H. 520, the defendant's language was "that he had not the money, but would pay as soon as he could." The court held it was not a conditional promise because there was no certain event to which the words looked forward, and it was held sufficient to take the case out of the statute. The expression of a promise "to settle" a demand has been held sufficient: *Johnson v. Bounthea*, 3 Hill (S. C.), 15, 30 Am. Dec. 347; *McLin v. McNamara*, 2 Dev. & B. Eq. (N. C.) 82. But the contrary has also been held: *Succession of Jewell*, 11 La. Ann. 83; *Bell v. Crawford*, 8 Gratt. 110. The effect of such an expression was held to depend upon all the circumstances in *Brayton v. Rockwell*, 41 Vt. 621; *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40. And in *McClelland v. West*, 59 Pa. St. 487, a similar expression was held to be a mere promise to examine the claims. In *Gill*

v. Donovan, 96 Md. 518, 54 Atl. 117, it was held where the debtor acknowledges the debt as due, and states that she is going to pay it, the promise to pay is not impaired by an expressed intention to discharge the obligation by a bounty to the creditor in her will. A proposition in a letter to settle with creditors at twenty cents on the dollar was held sufficient in *McNamee v. Tenny*, 41 Barb. 495. And in *Kirby v. Mills*, 78 N. C. 124, 24 Am. Rep. 460, a promise by the debtor to "see his brother and pay the debt" was held sufficient. And in *Cobham v. Administrators*, 2 Hayw. 6, 2 Am. Dec. 612, one of two administrators said when note of intestate was presented: "It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands shall be sold." The court held it a sufficient acknowledgment. In *Cross v. Dunlavy* (Tenn. Ch.), 46 S. W. 473, the debtor had worked for the intestate for twenty-one years, receiving enough to merely pay for his clothes; the promise to remember the debtor in the creditor's will was among the things which the court considered in holding the running of the statute to have been suspended. In *Acers v. Acers*, 22 Tex. Civ. 584, 58 S. W. 196, letters stating regret that the writer had allowed the debt to run so long; that he might have paid it but for carelessness; that he would get around to it as soon as he could; that the security was ample; and that he was obliged to ask for time, were sufficient to remove the bar. So, also, where the mortgagor of a chattel mortgage wrote to the mortgagee, "I shall sell our cattle the first chance; I am tired of the business, and want to pay off that mortgage," it was held sufficient to remove the bar: *Reymond v. Newcomb*, 10 N. Mex. 151, 61 Pac. 205. In *Bucker v. Korff's Estate* (Neb.), 97 N. W. 804, the debtor wrote: "You asked me if I wished to keep the money yet. I am glad you do not need it at present. I can make use of it yet." It was held sufficient as an acknowledgment. And in *Lee v. Perry*, 3 McCord, 552, 15 Am. Dec. 650, when the note was presented to the defendant, he said: "That note has not been paid, and I will not pay it unless compelled by law, as it is out of date, and I received no consideration for it." This statement was held a sufficient acknowledgment. In *Beasley v. Evans*, 35 Miss. 192, a written acknowledgment, with an express waiver of the statute was held sufficient, even though the writing also contains a promise to pay on a condition which is unfulfilled. So, also, an agreement by the defendant written on the back of notes to the effect that he would "not take any advantage of the statute of limitations on the within two notes, was held sufficient to remove the bar: *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153. See, also, *Gardner v. McMahon*, 3 Ad. & E., N. S., 561, to the same effect. In *Tennessee Brew. Co. v. Hendricks*, 77 Miss. 491, 27 South. 526, it was held where the debtor, at the foot of an open account on books of the creditors, subscribes an acknowledgment of the account, stating the amount, that such acknowledgment amounts to a new promise. In *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595, the maker of a note in letters expressed his purpose to pay what

he owed the payee, and offered to make a new note. The court held it to constitute a new promise although he claimed a deduction for services rendered. In *Mooar v. Mooar*, 69 N. H. 643, 46 Atl. 1052, the debtor made a new note and offered to give it in settlement of a debt. The court held that these facts authorized a finding of a new promise to pay the sum mentioned in the note, but not any sum in excess of that. And in *Bewman v. Rector* (Tenn. Ch.), 59 S. W. 389, it was held where the maker of a note agrees to sign a renewal, the agreement is a new promise to pay the indebtedness, though he does not sign the new note. In *McConaughy v. Wilsey*, 115 Iowa, 589, 88 N. W. 1101, the maker of a note wrote to the holder, saying: "In regard to that note, will say that I will try and pay it this fall. I have forgotten about making any request as to having it run over. Please give me a little light on that part." It was held a sufficient writing under the code. In *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267, 28 Am. Dec. 464, a debt was held sufficiently acknowledged by giving a note for interest due thereon. In *Ready v. McDonald*, 128 Cal. 663, 79 Am. St. Rep. 76, 61 Pac. 272, it was said that if a balance due upon an account stated, is afterward thrown into a new account stated, that the first account is taken out of the statute of limitations. In *Elliott v. Leake*, 5 Mo. 208, 52 Am. Dec. 314, where a party who received money on a parol contract for the sale of land acknowledges that he had received the money, and asserts that "he never denied it, and that the money was just," etc., and expresses his willingness to make a deed of the land to which the contracts related, it was held that these facts were sufficient to sustain a finding against a plea of limitations. And in *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145, a letter to creditor referring to property purchased and requesting employment of the creditor in order that he might pay for it in work, was held to amount to an unqualified admission of an existing debt which the debtor desired to pay.

C. Acts or Writings Held not to Show an Acknowledgment or New Promise to Pay.—In *Millwee v. Jay*, 47 S. C. 430, 25 S. E. 298, a statement in a letter by the maker of a note that "I hope we can agree on a settlement of the note soon," was held not such an acknowledgment or new promise as would come within the terms of the statute. And in *Ennis v. Pullman etc. Car Co.*, 165 Ill. 175, 46 N. E. 439, the suit was for professional services as general counsel. The plaintiff had been paid certain amounts, but claimed that the amount of his annual salary had never been fixed and sued for arrears. Plaintiff at an interview with the president of the company had been told, "Come back here at 3 o'clock and we will take up the matter of your salary and settle it," or "settle this thing." The court held it did not constitute such an acknowledgment or admission as would stop the running of the statute: See the previous section

for the citation of several cases involving promises to "settle." In *Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28, it was held that neither the statement that "as soon as I can, I am going to settle all my indebtedness," nor that "You have my duebill and I am going to pay it as soon as I possibly can," were sufficient as a "promise" under the code. And in *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998, statements in a letter saying "the amount I owe you will be paid some time. I don't know how much it is. You say one thousand dollars, but I could never figure that much. I always thought Little Harry [a former partner] paid that debt, but as he did not settle it I will see into it some time," and intimating financial embarrassment, but expressing hopes of getting large sums of money from some business ventures, were held insufficient to remove the bar. In the case of *Wood v. Merrietta*, 66 Kan. 748, 71 Pac. 579, the maker of a note and mortgage wrote a letter that if he could keep the land a year longer he thought he could make one-half payment in a year, and if he could not, he would be glad to give up the land, and requested that he be given a "show." The court held that it did not constitute an acknowledgment. In *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416, the letter of a debtor to the attorney of the creditor was couched in the following language: "It will be absolutely impossible for me to give you anything before after the 1st of June. I will send you a check for something then. Hope to be able to clear your acct. quick"; but the court held it was not sufficient to remove the bar. In *Alexander v. Muse* (Tenn.), 79 S. W. 117, the debtor sought to lull his creditor into a feeling of security by writing to him that "an honest man's note never went out of date." The court held that the expression was too indefinite to operate as a new promise to pay the note. In *Connecticut Trust etc. Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261, a letter from the indorser of a note to the holder stating his inability to pay it, but expressing a readiness to buy it if the holder will name some small sum, was held not to remove the bar. And in *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799, a written promise to pay a barred note "as soon as one can" was held insufficient to revive it. So, also, where the debtor said: "My intentions are true and faithful, but my abilities are rather cramped now until I can sell or make some money otherwise." The court held the statement not a new promise: *Wells v. Hargrove*, 117 Mo. 566, 23 S. W. 885. The statement, "I feel ashamed of it standing so long," was held not to imply a promise to pay the debt to which it referred: *Wilcox v. Williams*, 5 Nev. 206. So, also, in *Be Hughes' Estate*, 176 Pa. St. 387, 35 Atl. 244, mere expressions of grateful intention to pay a person five thousand dollars, he having rendered various domestic services from time to time, were held not sufficient to take his claim for the services out of the statute. In *Watson v. Barber*, 105 La. 799, 30 South. 127, verbal expressions of a debtor, indicative of his intention to make a legacy

in favor of a creditor, but not amounting to an agreement to postpone payment, were held insufficient to suspend limitations. Vague expressions relative to making the children of the creditor legatees were held insufficient as an acknowledgment in *Schonbachler v. Schonbachler*, 22 Ky. Law Rep. 314, 57 S. W. 232. In *Wurth v. Paducah*, 25 Ky. Law Rep. 586, 76 S. W. 143, the levying and collection of a tax by a city to pay its bonds was held not to extend the time for suit on its bonds. A ruling to the same effect was made in *Houston v. Jankowskie*, 76 Tex. 368, 18 Am. St. Rep. 57, 13 S. W. 269. In *Grady v. Wilson*, 115 N. C. 344, 44 Am. St. Rep. 461, 20 S. E. 518, a reply by a debtor's administrator to a demand for payment of the debt that he "would see the judge and do whatever he said," was held not a new promise. In *Fries v. Boisselet*, 9 Serg. & R. 123, 11 Am. Dec. 683, the statement of the debtor was that he owed the plaintiff the money and intended to have paid him, but that he had taken "ungentlemanly steps" to get it, and as he had taken those steps he would keep him out of it as long as he could. It was held that it did not constitute an acknowledgment. In *Macrum v. Marshall*, 129 Pa. St. 506, 15 Am. St. Rep. 730, 18 Atl. 640, an agreement by an indorser that the holder may sell for less than its face value, a judgment against the maker for the full amount of the note, and a renewal of such agreement with a waiver "of any statute plea thereon," was held not such an acknowledgment of indebtedness as would remove the bar. In *Hartranft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104, the debtor gave his oral promise to make a renewal of a debt and to waive the statute of limitations by a writing to be executed in the future; the instrument was prepared, but its execution was postponed from time to time, and finally left undone. The court held that the transaction did not amount to a renewal or a waiver of the statute.

h. Necessity for Promise to be Unconditional and Unqualified.—It seems to be an almost universal rule that an acknowledgment or new promise must be unconditional and without qualifications: *Brown v. State Bank*, 10 Ark. 134; *Harlan v. Bernie*, 22 Ark. 217, 53 Am. Dec. 564; *Burton v. Waples*, 1 Houst. 262; *Mellick v. De Seelhorst*, *Breese*, 221, 12 Am. Dec. 172; *Tyson v. McGill*, 15 La. 145; *Stockett v. Sasscer*, 8 Md. 374; *Bangs v. Hall*, 2 Pick. 368, 13 Am. Dec. 437; *Mumford v. Freeman*, 8 Met. 432, 41 Am. Dec. 532; *Wells v. Hargrave*, 117 Mo. 563, 23 S. W. 885; *Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962; *Stafford v. Bryan*, 2 Paige, 45; *Kensington Bank v. Patton*, 14 Pa. St. 479, 53 Am. Dec. 564; *Brown v. Joyner*, 1 Rich. 210; *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, 9 N. W. 72. Sometimes the rule is stated that an acknowledgment must not be accompanied by anything which is sufficient to rebut the inference of a promise to pay the debt: *Ten Eyck v. Wing*, 1 Mich. 40; *Ventris v. Shaw*, 14 N. H. 422; *Cocks v. Weeks*, 7 Hill, 45; *Senseman v. Herahman*, 82 Pa.

St. 83. Thus in *Danforth v. Culver*, 11 Johns. 146, 6 Am. Dec. 361, an admission of the debt, but accompanied by a claim that it was "outlawed," and that the debtor intended to avail himself of that fact, was held insufficient as a promise to pay. The same ruling was made in *Bangs v. Hall*, 2 Pick. 368, 13 Am. Dec. 437, under similar circumstances. But in *Cadmus v. Dumon*, 11 N. J. L. 176, an acknowledgment of the debt, though accompanied by a claim that it was barred by the statute of limitations, was held sufficient. In *Frey v. Kirk*, 4 Gill & J. 509, 23 Am. Dec. 581, an admission that the debt is unpaid, coupled with a refusal to pay on the ground that the debtor had been discharged under the insolvent laws, was held insufficient as an acknowledgment, even though the discharge was void with respect to that particular debt. And in *Dickinson v. McCanry*, 5 Ga. 486, 48 Am. Dec. 298, the admission of the genuineness of a note, accompanied by a protestation that the note had been discharged, was held insufficient to remove the bar.

1. **Effect of Conditional Promise.**—It seems to be well settled that an acknowledgment of a debt accompanied by a promise to pay under certain terms and conditions is sufficient to toll the statute, provided that the terms or conditions are performed or fulfilled: *Richardson v. Bricker*, 7 Colo. 58, 49 Am. Rep. 344; *Bulloch v. Smith*, 15 Ga. 395; *Boone v. O'Hern*, 98 Ill. App. 610; *Guy v. Tams*, 6 Gill, 82; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799; *Wilcox v. Williams*, 5 Nev. 206; *Stowell v. Fowler*, 59 N. H. 585; *Parker v. Butterworth*, 46 N. J. L. 244, 50 Am. Rep. 407; *Sherman v. Wakeman*, 11 Barb. 254; *Bates v. Herren*, 95 N. C. 388; *Shaw v. Newell*, 1 R. I. 488; *Lange v. Caruthers*, 70 Tex. 718, 8 S. W. 604; *Steele v. Towne*, 28 Vt. 771; *Tridell v. Munhall*, 124 Fed. 802; *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174. The rule has been illustrated in numerous cases. Thus, in *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383, the court held that where the debtor had promised to pay "the moment he is able," the statute begins to run as soon as he has pecuniary ability to pay. In *Seaward v. Lord*, 1 Greenl. (Me.) 163, 10 Am. Dec. 50, the maker of a note denied his signature, but said if it could be proved that he signed it he would pay it. The court held it sufficient to remove the bar upon proof of his signature. And in *Shown v. Hawkins*, 85 Tenn. 214, 2 S. W. 34, a promise to pay when the debtor had collected an amount due him from a certain source was held conditional, and not enforceable until it appeared that the contingency expressed had happened. A similar holding was made in *Hanson v. Towle*, 19 Kan. 273, where an administrator promised to pay as soon as money was realized out of the estate. In *Paddock v. Colby*, 18 Vt. 485, an expression of willingness to settle a claim if established, although accompanied by a denial of indebtedness, was held sufficient if the indebtedness was proved to exist. But the

condition placed upon the offer by the debtor must be accepted by the creditor. Thus, it was held in *Rossiter v. Colby*, 71 N. H. 386, 52 Atl. 927, that an unaccepted offer of the debtor to pay such sum as certain referees would find to be due on his promissory note was not such an unqualified admission of the debt as would raise an implied promise to pay it. And in *Simonton v. Clark*, 65 N. C. 525, 6 Am. Rep. 752, an unaccepted offer to pay in Confederate money was held insufficient to imply a new promise to pay. But in *Johnson v. Bonnethea*, 3 Hill, 15, 30 Am. Dec. 347, the fact that the debtor said that he had an account against his creditor which he would discount against his claim, and that he would settle with him when such account was made out, was held to be a distinct confession of liability. And in *Ogden v. Wentworth*, 68 Ill. App. 94, a promise to pay a claim after other claims which the debtor was paying by monthly installments was held not a conditional promise, and was held sufficient to remove the bar of the statute. But in *Cook v. Farley* (Neb.), 95 N. W. 683, a statement that the debtor is trying to collect from another a sum which includes the balance due his creditor, and that he can do no more than pay when he realizes such claim, was held insufficient to remove the bar without proof that the debtor had realized on the claims mentioned. So, also, in *Harlan v. Bernie*, 22 Ark. 217, 76 Am. Dec. 428, a written acknowledgment at the foot of an account that the "debits and credits are correct and subject to the settlement of accounts" between the parties was held insufficient as an acknowledgment, without showing that there was in fact a subsequent settlement of the accounts of the parties.

j. Effect of Offer to Compromise.—It seems to be the rule that an unaccepted offer to compromise the debt is not sufficient to constitute such an acknowledgment of it as will imply a promise to pay it where the offer to compromise does not contain an unqualified admission of a subsisting indebtedness: *Pool v. Relfe*, 23 Ala. 701; *Brenneman v. Edwards*, 55 Iowa, 374, 7 N. W. 621; *Weston v. Hodgkins*, 136 Mass. 326; *Chambers v. Rubey*, 47 Mo. 99, 4 Am. Rep. 318; *Rossiter v. Colby*, 71 N. H. 386, 52 Atl. 927; *Sands v. Gelston*, 15 Johns. 511; *Wolfe v. Fleming*, 23 N. C. 290; *Cohen v. Aubin*, 2 Bail. 283; *Allcock v. Ewen*, 2 Hill, 326; *Goldstein v. Gans* (Tex. Civ.), 32 S. W. 185; *Cross v. Conner*, 14 Vt. 394; *Slack v. Norwich*, 32 Vt. 818; *Edwards v. Bates County*, 55 Fed. 436. The court in *Brenneman v. Edwards*, 55 Iowa, 376, 7 N. W. 621, in holding that such an offer to compromise did not constitute a new promise, said: "We believe the rule to be, without any exception, that a party shall never be prejudiced or estopped to deny a claim against him by an offer to compromise. It may be that, at a time when the courts looked with disfavor upon the statute of limitations, decisions not in accord with this rule were made, but if such decisions be found, they are not in harmony with the modern cases." In *Broddie v. Johnson*, 33 Tenn.

(1 Sneed) 464, a proposed reference to decide whether the debtor should pay anything was held insufficient to take the case out of the statute. In *Curtis v. Sacramento*, 70 Cal. 412, 11 Pac. 748, there was an agreement between the debtor and creditor to arbitrate a disputed indebtedness; the agreement recited in general terms the indebtedness, and contained a promise by the debtor to pay the amount of the award. The court, however, held that the agreement, no matter whether made before or after the statute of limitations had run against the demand, was insufficient to defeat the operation of the statute as against the original demand. Many instances may be found in which offers to compromise have been held to constitute an acknowledgment of the debt sufficient to imply a new promise, but a close reading of those cases will generally disclose the fact that the offer was couched in language which admitted a subsisting indebtedness. See the following cases: *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Foster v. Smith*, 52 Conn. 449; *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896; *Lackey v. Macmurdo*, 9 La. Ann. 15; *Walker v. Cruikshank*, 23 La. Ann. 252; *Brooks v. Chesley*, 4 Gill, 205; *Murray v. Coster*, 20 Johns. 576, 11 Am. Dec. 333; *Gest v. Heiskill*, 5 Rawle, 134; *McDonald v. Grey*, 29 Tex. 80; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483.

SHUGART v. SHUGART.

[111 Tenn. 179, 76 S. W. 821.]

HUSBAND AND WIFE—Right of Surviving Husband to Personality of Wife.—A surviving husband is entitled to take as his own funds belonging to his deceased wife on deposit in a bank, coming to her from her father's estate and kept and used as her own. (p. 779.)

BILLS AND NOTES—Consideration.—Funds belonging to a deceased wife deposited in bank belong, upon her death, to her husband, and notes for the amount of such funds voluntarily executed by him to his children, based upon love and affection, are without consideration and unenforceable. (p. 779.)

BILLS AND NOTES—Consideration—Parent and Child.—Services rendered by a daughter to her mother, such as she is morally bound to render, do not constitute a valuable consideration for a note executed by her father to her, in the absence of an express promise to pay for such services. (p. 779.)

GIFTS.—Notes of a Donor are not a good subject of a gift, but are mere promises to pay, in future, not complete until payment, and cannot be enforced, either against the donor, or against his estate after his death. (p. 779.)

GIFTS—Delivery.—A gift, to be valid, must be executed, and the property or money must be delivered. There must be such an actual change of possession as that the donor loses the dominion and control over it. (p. 780.)

GIFTS—Delivery.—To constitute a valid gift the intention of the donor to part with the dominion over, and control of, the subject of the gift must clearly appear. (p. 780.)

GIFTS—Certificate of Deposit.—Mere manual delivery of an unindorsed certificate of deposit, payable to the donor's order, does not vest title so as to constitute a gift, especially if not made for a valuable consideration. (p. 780.)

BILLS AND NOTES—Estoppel to Deny Consideration—Parent and Child.—If a father, without consideration, executes a note to his child, he is not estopped to deny liability thereon by the fact that the child has contracted a debt for board, relying on the note to pay therefor, if it does not appear whether such debt was contracted before or after the suit was brought. (p. 780.)

Powers & Burrows, for the plaintiffs in error.

H. Van Deventer, for the defendant in error.

¹⁸¹ **WILKES, J.** These are suits upon two notes, commenced before a justice of the peace. On trial in the circuit court before a jury there was verdict and judgment for defendant, and plaintiffs have appealed and assigned error. The defense to the notes is want of consideration.

The facts, so far as necessary to be stated, are that plaintiffs are the children of defendant. Some years ago the wife of defendant and mother of the plaintiffs died, leaving on deposit in bank one thousand dollars. It appears that this money came to the wife from her father's estate, and was kept and used as her own. After her death letters of administration issued to her husband, and he wound up her estate in the county court of Knox county. He paid the expenses of administration out of the fund, which appears to have been all the estate the ¹⁸² wife left, and the remainder, of nine hundred and two dollars and seventy-five cents, he receipted for as being entitled thereto. It appears that after her death he, for a time, supposed this money would go to his children, and so stated to them and to others; but, on being informed that he was legally entitled to it, he administered and reduced it to possession by receipting for it, and having a new certificate issued in his name as administrator, and afterward putting the money to his own credit. After this he executed to his children the two notes now in controversy, as representing this fund. His version, which on appeal we must take to be the correct one, as the jury has adopted it, is that he issued these notes to his children to secure them that amount out of his estate in the event he should be killed or die suddenly, in addition to their share in his estate. He says he executed them voluntarily, with the under-

standing had at the time that they were to take effect only in case of his death. He further states that he handed the notes to his daughter Mary Lee with instructions to put them away among his valuable papers. The daughter Mary Lee Shugart states that her father promised her fifty dollars of this fund more than each of the other children, because she had kept house for him and waited upon her mother. Hence the note given to her was for two hundred dollars, while the other children were to have only one hundred and fifty dollars each. He denies that he promised to pay her any amount for such services. It appears that he put into his daughter's hands a certificate of deposit for five hundred dollars for the benefit of his four other children. This certificate was payable ¹⁸³ to his own order, and was not indorsed, but merely delivered, and afterward taken up by him and cashed.

Without taking up the assignments seriatim, we will proceed to dispose of the case upon the features which are controlling:

We are of opinion that on the death of the wife the defendant, as her husband, was entitled to take the money which she left on deposit, as his own: *Hamrico v. Laird*, 10 Yerg. 222; *Prewitt v. Bunch*, 101 Tenn. 723, 50 S. W. 748, and cases cited. We can see no legal obligation he was under to give it to his children. The gift, if it can be so called, was based wholly on love and affection, and to take effect only after death. A note whose only consideration is love and affection is not enforceable in law: 1 *Daniel on Negotiable Instruments*, 4th ed., sec. 179; 4 *Am. & Eng. Ency. of Law*, 2d ed., p. 189.

The services rendered by the daughter to her mother are such as she was morally bound to render without compensation, and do not constitute a valuable consideration, and for them no compensation can be recovered in the absence of an express promise: *Harrison v. McMillan*, 109 Tenn. 77, 69 S. W. 973; 1 *Daniel on Negotiable Instruments*, 4th ed., sec. 182. And the jury must have believed his statement that he made no promise. A donor's own promissory note is not a good subject of gift. It is a mere promise to pay in the future, and is not complete until payment, and cannot be enforced, either at law or in equity, against the donor, or against his estate after death: 14 *Am. & Eng. Ency. of Law*, 2d ed., pp. 1016, ¹⁸⁴ 1030; 1 *Daniel on Negotiable Instruments*, 4th ed., secs. 179, 180; 8 *Am. & Eng. Ency. of Law*, 1st ed., p. 1320; 10 *Am. & Eng. Ency. of Law*, 2d ed., p. 1030.

It is insisted that the court should look behind the notes, and hold that the money was delivered to the children, and that he afterward borrowed it. But the record does not sustain this contention. The money was never actually delivered. A certificate of deposit in the defendant's name for five hundred dollars was delivered, but it was not indorsed, and it was afterward taken up and cashed by the defendant. A gift, to be good, must be executed, and the property or money, must be delivered. There must be an actual change of possession, to the extent that the owner loses the dominion and control over it: 8 Am. & Eng. Ency. of Law, 1st ed., 1314; 14 Am. & Eng. Ency. of Law, 2d ed., 1016-1020; *McEwen v. Troost*, 1 Sneed, 186; *Trowell v. Carraway*, 10 Heisk. 104; *Marshall v. Russell*, 93 Tenn. 261, 25 S. W. 1070. And the intention of the owner to part with the dominion and control must clearly appear: *Sheegog v. Perkins*, 4 Baxt. 281. The mere manual delivery of the certificate of deposit, payable to the donor's own order, and not indorsed by him, would not vest title, unless it was made for a valuable consideration, or was not subsequently revoked: 2 Daniel on Negotiable Instruments, 4th ed., sec. 1702. We are not considering gifts of choses in action, such as notes of third persons. These are the subject of gift both inter vivos and causa mortis: 14 Am. & Eng. Ency. of Law, 2d ed., 1029-1062; *Brunson v. Brunson*, 19 Tenn. 185 630; *Donnell v. Donnell*, 38 Tenn. 270; *Brown v. Moore*, 40 Tenn. 671.

Questions were offered affecting the character of defendant, and imputing moral turpitude, but were not allowed to be asked, and we think properly. It does not appear specifically from the bill of exceptions what the questions were, nor what answers would have been made. There is no error in this.

There are other minor exceptions and assignments, but they are not material, and present no ground for recovery.

In the application for a new trial it was insisted that the defendant was estopped to deny liability on the note to his daughter, Mary Lee Shugart, because she had contracted debts for board, relying upon this fund to pay them. The proof shows that she brought suit very soon after leaving her father's home, and it does not appear whether she incurred the debts before or after suit was brought.

We are of opinion that this does not make out a ground for recovery, and the judgment of the court below is affirmed, with costs.

To Consummate Gifts inter vivos, there must be an absolute delivery of the subject matter with an intention to part with all interest in and dominion over it. The delivery, however, need be such only as the nature of the property reasonably admits of: *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004; *Waite v. Grubbe*, 43 Or. 406, 99 Am. St. Rep. 764.

On the Gift of Notes and Checks, see *Pickslay v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740; *School District v. Sheidley*, 138 Mo. 672, 60 Am. St. Rep. 576; *Mader v. Cool*, 14 Ind. App. 239, 56 Am. St. Rep. 304; *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19.

A Child Seeking to Recover for services rendered his parent must prove an express and actual contract for compensation: *Zimmerman v. Zimmerman*, 129 Pa. St. 229, 15 Am. St. Rep. 720. See, too, *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125.

LEGERE v. STATE.

[111 Tenn. 368, 77 S. W. 1059.]

EVIDENCE—Impeachment of Witness.—If evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence is inadmissible. (pp. 783, 784.)

EVIDENCE—Impeachment of Witness.—If it is charged that the testimony of a witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive of personal interest, it may be supported by showing that he made a similar statement before that relation or motive existed. (p. 784.)

EVIDENCE—Impeachment of Witness.—If a witness is impeached by proof of contradictory statements, confirmatory and consistent statements made by him after making such contradictory statements are not admissible in support of his impeached testimony. (p. 785.)

ALIBI—Reasonable Doubt.—If the evidence fairly raises the defense of an alibi, the jury should be instructed that if such evidence, in connection with the other testimony in the case, raises a reasonable doubt as to whether the accused was at the place of the crime, or at a different place, the defendant should be acquitted. (p. 786.)

CRIMINAL PRACTICE—New Trial.—If a motion for a new trial in a criminal case is made in good faith in proper time, on the ground of misconduct of the jury in separating, and of the officer in charge in permitting such separation, and a proper case is presented for the exercise of the trial court's discretion, which he refuses to exercise upon the ground that the motion comes too late, and after his jurisdiction has been exhausted, because judgment has been rendered and sentence passed, and an appeal granted, he is in error in refusing to exercise his discretion, and to set aside the order granting the appeal, in order that defendant may submit affidavits in support of his motion. (p. 786.)

H. T. Coleman, R. L. Davis, L. M. Jarvis, C. W. Margraves and J. A. Susong, for the appellant.

C. T. Cates, attorney general, and Coleman & Coleman, for the state.

370 BEARD, C. J. The plaintiff in error was jointly indicted with one Perry Meyers for the killing of John Davis and Grant Seals on the evening of the 7th of June, 1902. Subsequently Meyers asked a severance, which was granted him by the court. About the same time the state entered a nolle prosequi as to the killing of Grant Seals, and then placed the plaintiff in error on trial alone for the homicide of John Davis, the result of which was his conviction of murder in the first degree. Motion for a new trial having been overruled, the case has been appealed to this court, and many errors are assigned upon the action of the circuit judge.

371 The verdict in the case rests largely upon the testimony of Perry Meyers, who was used by the state as a witness. An examination of the record satisfies us, if not essential to sustain the theory of the state, that at least his testimony was very important to it. This being so it was proper, under the peculiar circumstances of the case, while the state had the full benefit of it, under an application of the rules of law, yet the plaintiff in error should be safeguarded so that undue weight be not given to it.

Immediately after the killing of Davis and of Seals, the record discloses that both Legere and Meyers were arrested upon a warrant charging them with the murder of these men. At the coroner's inquest held the day following the arrest, Meyers testified he had been with Legere and the deceased during the day of the killing, but that neither he nor Legere had anything to do with it. Subsequently, upon the preliminary examination before a magistrate, he was examined, and again, under oath, reiterated the statement as to the innocence of himself and of Legere of the crime charged against them. On both occasions he gave a detailed account of what occurred while in company with the murdered men, and of the separation of Legere and himself from them while they were still alive, and of their acts and movements during the evening and night following this separation.

As a result of this preliminary examination both these parties were held to answer the charge of murder **372** at the next term of the circuit court of Hancock county, at which time the

joint indictment was found against them. After this, and before the trial took place, Meyers was in some way released from jail, where he had been for some months confined upon this charge. Soon after his release negotiations were entered upon by his father and himself with the prosecutor, which resulted in an agreement that, in consideration of his turning state's evidence against Legere, as far as the prosecutor could control the matter Meyers should be relieved of any further prosecution for this offense; and at the same time a bond was executed to the father in the penalty of one thousand dollars, by the prosecutor and a surety, in which they undertook to prevent all further criminal procedure looking to the conviction of the son. Thus assured, Meyers became a witness for the state, and on the trial of the case testified that Legere killed Davis and Seals about dusk on the evening of the 7th of June, 1902, using his own gun for the purpose of shooting Seals, and that he then violently took from the witness a Smith & Wesson revolver, with which he shot Davis to death, and, turning, finished Seals, who was still alive.

He further swore that the testimony which he had given under oath at the coroner's inquest and the preliminary examination as to the innocence of Legere was given under duress, that, immediately following the homicide, Legere had extorted from him a promise to testify as he did, under a threat that he would kill him ³⁷³ if he did otherwise. For the purpose of corroborating this testimony as to the killing by Legere, the state, over the objection of the counsel for Legere, was permitted to show by the father and by the sister of the witness that after his release from incarceration, and evidently at or about the time he was negotiating for relief from prosecution, he gave to them practically the same account as to the killing by Legere of these parties as was detailed by him on the witness-stand.

The action of the court in admitting this corroborative testimony has been made a ground for the first assignment of error in this court. That there was error in this, we have no doubt. The general rule is, where evidence of contradictory statements is offered to impeach the credit of a witness, testimony that on former occasions he made statements consistent with those made by him on the witness-stand is inadmissible. This seems to be the rule in England at this time. The courts in America have grafted certain exceptions upon this rule, and so fixed are they that it may be considered now that of themselves they constitute an independent rule. And so, it may be said, it is now es-

established in this country that where it is charged the testimony of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive of personal interest, it may be supported by showing he had made a similar statement before that relation or motive existed. However little support such testimony may give to the impeached witness, yet it has been held to be ³⁷⁴ competent upon the ground that the consistent statement had been made at a time that there was little, if any, temptation to speak an untruth with regard to the matter afterward brought into controversy. The rule embracing these exceptional cases has been frequently recognized in this state; but in no case, so far as we have been able to discover, has the corroborative testimony been admitted where it was clear the statement so relied upon was made at a time when it was to the interest of the witness to make a false statement, and his probable motive was to use it in fortifying himself when attacked or impeached. We have a number of cases where such confirmatory evidence as this has been allowed, expressly or by necessary implication, upon the ground that such statements were made at a time when no motive existed to misrepresent the facts: *Hayes v. Cheatham*, 6 Lea, 2; *Dosset v. Miller*, 3 Sneed, 76; *Queener v. Morrow*, 1 Cold. 123; *Third Nat. Bank v. Robinson*, 1 Baxt. 479; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Graham v. McReynolds*, 90 Tenn. 674, 18 S. W. 272.

While it "sometimes is a matter of nice judgment to determine that no motive existed at a given time to misrepresent the facts" (*Spurlock v. Brown*, 91 Tenn. 240, 18 S. W. 868), it is not so in the present case. At the time these statements relied upon as being confirmatory were made, there was every temptation for the witness to falsify the facts. He was still in the hands of the law, resting under an indictment for this murder, and ³⁷⁵ was seeking to make an arrangement by which, upon furnishing testimony to the state, he could escape its meshes. In addition, they were incompetent because made at a time later in date to that at which the contradictory declarations were made: *Conrad v. Griffey*, 11 How. 481, 13 L. ed. 779; *Ellicott v. Pearl*, 10 Pet. 416, 9 L. ed. 475.

The inadmissibility of such testimony is clearly announced in *Queener v. Morrow*, 1 Cold. 123. That was a case where an effort was made to corroborate two witnesses who were assailed upon the ground of their general bad reputation, and also by proof of previous contradictory statements. To sustain their

credit, the plaintiff, who had produced them as witnesses, was permitted to show previous declarations consistent with those given in evidence, but made subsequent to the contradictory statements in question.

The court, after agreeing to the reasonableness of the rule as to the admission of such testimony within proper limitations, said: "To allow consistent statements, for the purpose of giving support to the credit of the witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and perhaps escape the just consequences of his own false representation and tergiversation. And it would be still worse to hold that the statement of an arraigned felon, in vinculis, offered, perhaps, as a bribe to his discharge, and made after the contradictory statement ³⁷⁶ proved against him, and at a time when he was laboring under a motive to misrepresent the facts, might be received. This cannot be allowed, because of its tendency to corrupt the administration of justice, as well as the inherent absurdity of such a principle."

Upon reason as well as upon authority, we hold the exception made to this testimony by the plaintiff in error was well taken, and that the circuit judge was in error in permitting it to go to the jury.

We think the circuit judge was also in error in his instruction to the jury as to the effect of testimony submitted by the defendant below as to his defense of an alibi. On this subject his charge was as follows: "The defense of an alibi is very conclusive, if certainly, clearly and fully established; but it can only be conclusive when taken as true, and it is shown that there was no possibility of presence at the time or place of offense, when that is necessary. The defense of the alibi is liable to abuse not only when a design exists to practice a fraud on the state, but often, where that design does not exist, by ignorant mistakes as to the particular hour at issue, and by reason of lapse of time; and I therefore caution you against this abuse to which the defense is exposed. The evidence of an alibi does not exclude the absolute possibility of presence at the time and place of the offense, to be of some value. It can be admitted and considered for what it may be worth. If it renders it very improbable that defendant could have been present, it should be considered, in connection with ³⁷⁷ the other

evidence in the case, in determining whether or not there is a reasonable doubt of defendant's guilt."

It is insisted that this instruction was vague and misleading, and that parts of it were the equivalent of telling the jury that they must be conclusively convinced that the defendant was not present at the commission of the crime alleged, and that it was incumbent on the defendant to show conclusively that it was impossible for him to have been present at the time and place, before this defense would be of any avail. While we do not think the instruction is amenable to the severe criticism to which it has been subjected, or that any part of it, when taken in its proper connection, will bear the construction thus put upon it, yet we do not think, in view of the fact that the defense rested largely upon the claim of an alibi, and there was much testimony tending to support this claim, the law on this subject was as distinctly put to the jury as the defendant had a right to demand. The rule on this subject as laid down in *Davis v. State*, 5 Baxt. 617, *Wiley v. State*, 5 Baxt. 662, and *Jefferson v. State*, 3 Shannon's Tenn. Cas. 330, and approved in many other cases, is that, "where the proof fairly raises the defense of an alibi, the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide, or at a different place, the defendant should be acquitted." As has been said: "This is a sound rule, and ought to be given to the jury in direct and unequivocal language."

³⁷⁸ Error is also assigned upon the action of the trial judge in declining to entertain a motion for a new trial, upon the ground it came too late, and at a time when the jurisdiction of the trial judge over the case had been exhausted. It seems from the record the jury returned a verdict of guilty on the morning of the 25th of July, 1903, and at 11 o'clock of that morning the defendant moved the court for a new trial upon the ground of misconduct of the jury in separating, and of the officer in charge thereof in permitting the separation, and asked the court to grant counsel for the defendant time, before the adjournment of the court, in which to prepare affidavits laying ground for this motion. This the court refused, giving as a reason for this refusal that judgment had been entered, and sentence passed, and an appeal granted to this court.

There can be no doubt the trial judge was in error in supposing his jurisdiction over the case was exhausted by the grant of an appeal. The whole matter was still in the breast of the

court, and the proper practice would have been for him to have set aside the order granting the appeal, and to have given time to the counsel to present their affidavit showing, if they could, the separation of the jury during their consideration of the case. There being no appearance of bad faith upon the part of counsel in making this motion, and it being stated that knowledge of the fact of separation had just come to them, it was a proper case for the court to have exercised its right to set aside the grant of appeal, and to give an ³⁷⁹ opportunity to the defendant below to submit affidavits. Failing to do this, and placing it upon the ground that he had no right to exercise his jurisdiction, the learned trial judge committed an error. On this point we put our holding—not upon the ground that he abused his discretion, but rather that, having this discretion, he failed to exercise it, upon the erroneous idea that he had none.

We do not consider other assignments that are made, as for these already indicated there must be a reversal and remand.

If the Evidence to Support an Alibi creates a reasonable doubt of the defendant's guilt, he is as much entitled to an acquittal as though such doubt had been created by any other legitimate evidence: *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28; *State v. McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558.

The Impeachment of Witnesses is the subject of a monographic note to *Allen v. State*, 73 Am. Dec. 762-777. And evidence admissible as bearing upon the credibility or bias of a witness is the subject of a monographic note to *Lodge v. State*, 82 Am. St. Rep. 25-68.

McKELVEY v. McKELVEY.

[111 Tenn. 388, 77 S. W. 664.]

PARENT AND CHILD—Child's Right to Damages for Corporal Punishment.—The right of a parent to control his infant child includes the right to inflict moderate chastisement upon it, without civil liability in damages therefor. If the child has any redress in such case, it is to be found in the criminal law, and in the remedy afforded by the writ of habeas corpus. (p. 788.)

PARENT AND CHILD—Damages for Cruel Treatment of Parent.—A child has no right to recover damages against his father and stepmother for cruel and inhuman treatment inflicted by the stepmother with the consent of the father. (p. 789.)

B. A. Heard and C. C. Moore, for the appellant.

B. Pope, J. Bright and T. Thatch, for the appellees.

³⁸⁰ BEARD, C. J. This is a suit instituted by a minor child, by next friend, against her father and stepmother, seek-

ing to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father. Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect and educate it. These rights could only be forfeited by gross misconduct ^{sae} on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than Judge Cooley, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason it should not be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of *Hewlett v. George*, reported in 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. It is there said: "So long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and of a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the ³⁹¹ parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presu '++ was the result

of his coercion; if out of his presence, then he and she would be jointly liable for the wrong. So at last it comes back to the question as to the right of a minor child to institute a civil action against the father for wrongs inflicted upon it.

An analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture. This holding rests in part upon their unity by virtue of the marriage relation, which would preclude the one from suing the other at law, and in part upon the respective rights and duties involved in that relation.

In *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, it was held that a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who assisted him in making the assault. As was said by the court, at common law the husband ³²² was the guardian of the wife, and was bound to protect and maintain her, and on that ground "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it": 2 Kent's Commentaries, 180.

In view of the evolution of the law in the amelioration of the married woman's condition and the comparative independence that was now secured to her, it was insisted in that case that the action should be maintained. To this, however, the court replied: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. She has the privilege of the writ of habeas corpus if lawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce."

In *Phillips v. Barnett*, L. R. 1 Q. B. Div. 436, the same rule is announced, although it was insisted there, as in the case from Maine, that, the marriage relation having ceased by divorce, the wife should be let in to her action for damages against the former husband for personal injuries inflicted upon her during coverture; the argument being that the relation simply suspended the right of action, and, this relation having been terminated, the right was then in a condition to be enforced. But it was there said, as in the first case, that the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy either during or

393 after coverture, because there was no civil right to be redressed.

We think that the circuit judge acted in obedience to a well-settled rule controlling the relation of father and child, and in furtherance of a sound public policy, in sustaining the demurrer to the declaration in this case, and his judgment is affirmed.

The Decision of the supreme court of Mississippi, cited in the principal case, is the only authority that has come under our observation, with the exception of the principal case, directly bearing upon the civil liability of a parent for personal injuries inflicted upon his minor child. An examination of the monographic note to *Drum v. Miller*, ante, p. 527, will show that teachers may be held answerable in damages for injuries done to their pupils.

RUOHS v. TRADERS' FIRE INSURANCE COMPANY.

[111 Tenn. 405, 78 S. W. 85.]

INSURANCE—Reinsurance is an insurance by the first insurer of the whole or of some part of his interest in the risk created by his contract of insurance. Reinsurance is a contract that one insurer makes with another to protect the first from the risk he has already assumed. (p. 797.)

INSURANCE—Reinsurance—Privity.—Generally, a contract of reinsurance operates solely between the insurer and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. Hence, the former is in no respect liable, either as surety or otherwise, to the latter. (p. 798.)

INSURANCE—Reinsurance.—Direct Liability may be incurred by the reinsurer to the originally insured, if the intention to create it sufficiently appears from the contract of reinsurance. (p. 798.)

INSURANCE—Reinsurance—Liability to Originally Insured. If, in reinsuring risks for which policies are outstanding, the reinsurer contracts with the reinsured to assume the policies and to pay the holders thereof all such sums as the reinsured may become liable to pay, the original policy-holders suffering loss may recover from the reinsurer directly, although not named in the contract. (p. 799.)

INSURANCE—Reinsurance—Liability to Originally Insured Policy-holder.—If an original insurer sells its business and goodwill to another person, and the latter, in consideration thereof, reinsures the risks of the first insurer, and contracts to pay losses under its outstanding policies, the reinsurer becomes liable to the originally insured policy-holders. (p. 799.)

CONTRACTS—Parties.—Beneficiaries, though not parties to contracts, may maintain actions directly thereon in their own names against the promisor, when the promise between the promisor and promisee is made upon a sufficient consideration for the benefit of third parties. (p. 804.)

Chambliss & Chambliss and J. T. Leyett, for the appellants.

Cook, Swaney & Cook, for the appellees.

407 McALISTER, J. Complainants, who are original policy-holders in the Traders' Fire Insurance Company, preferred this bill against the North British and Mercantile Insurance Company to recover indemnity, first, for fire losses claimed to have been sustained; second, for returned premiums on account of canceled policies; and, third, claims of W. J. Colburn & Co. for returned premiums paid to policy-holders **408** of the Traders' company under written instructions of the North British company. The theory of the bill is that complainants are the beneficiaries of a contract entered into between the Traders' and the North British companies, by which the latter assumed the payment of the liabilities of the former company. The contract, which is made the basis of the present suit, is in the words and figures following, to wit:

"In consideration of one dollar, the receipt of which is hereby acknowledged, and a further payment of ten thousand dollars before 12 o'clock noon, on Saturday, April 28, the North British and Mercantile Insurance Company of Edinburgh and London, hereby agrees through its United States manager, to assume the fire risks of the Traders' Fire Insurance Company, of New York, from 6 o'clock P. M., April 27, 1900, not otherwise reinsured.

"A further payment on account, of twenty-five thousand dollars, to be paid on or before May 1st, and the balance due, namely, the net, unearned premiums on outstanding policies, less fifteen per cent commissions thereon, to be paid upon completion of schedules, and at least, within thirty days from date hereof.

"This contract to be null and void unless payments as above stated are duly made.

"This temporary agreement to be replaced by a final contract of like terms and conditions when the total amount due hereunder is determined as per schedule. Schedules to be completed as soon as practicable.

409 "NORTH BRITISH AND MERCANTILE INSURANCE COMPANY OF EDINBURGH AND LONDON,

"By E. G. RICHARDS, United States Manager.
"THE TRADERS' FIRE INSURANCE COMPANY
OF NEW YORK,

"By W. A. HALSEY, President.

"April 27, 1900."

It is insisted on behalf of the North British company that no liability attaches to it on account of said contract, for the reason, as disclosed on its face, it was only a provisional and temporary agreement, dependent for its consummation upon the payment of the consideration therein expressed, and that the Traders' company, having defaulted in the payment of seventy thousand dollars due thereunder; the North British company was constrained on August 3, 1900, to declare said contract forfeited. The insistence made on behalf of the North British company is that the policy-holders of the Traders' Fire Insurance Company can have no higher rights than that company, for the reason they claim under the contract which the Traders forfeited. It is said that this contract was clearly a contract of reinsurance, as is disclosed by the language used, "not otherwise reinsured." Joyce on Insurance, section 117, is then cited for the proposition, viz.: "A reinsurance contract is a contract of indemnity to the company reinsured only. The reinsured sustains as to the reinsurer the same relation which the original insured bears to the reinsured. The contract of reinsurance does not inure to the benefit of the insured. He has no claim, legal or equitable, against the reinsurer."

⁴¹⁰ Royal Ins. Co. v. Vanderbilt Ins. Co., 102 Tenn. 267, 52 S. W. 168, is also cited, in which it was said as follows: "A contract of reinsurance is peculiar in its character, and differs from the ordinary policy of insurance. It claims no privity between the reinsurer and the party originally insured. It is simply an agreement to indemnify the insurer, partially or altogether, against a risk assumed by the latter in a policy issued to a third party."

The general rule is conceded that a third party may sue directly in his own name on a contract made for his benefit, but it is insisted that the exception is well established that such third party cannot maintain an action to enforce the promise, where the promise is void as between the promisor and the promisee. In support of this position counsel for the North British company cite *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617, where it appeared that a grantee, holding under a warranty deed which contained a covenant that the grantee assumed and agreed to pay a mortgage on the premises, had been evicted by a paramount title. It was held that the holder of the mortgage could not enforce the covenant for the reason that the consideration therefor had wholly failed. Andrews, J., delivering the opinion of the court, wrote: "It is said that the

action can be maintained upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases, but I know of no authority to support the proposition that a person not a party to the promise, but for ⁴¹¹ whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and the promisee for fraud, want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found."

The position assumed by counsel for the North British company may be best stated in his own language, to wit: "1. That the preliminary contract was not a contract of assumption, but was a contract of reinsurance. 2. That, if construed to be a contract of assumption, the Traders' Fire Insurance Company could not recover from the North British and Mercantile Company, by reason of its own breach, and that these claimants could not be in any better attitude than the Traders' company. 3. That, as shown on this record, the North British and Mercantile Insurance Company acted as agent during the existence of the preliminary contract, and has done no act or thing which would mislead these claimants. 4. That the North British and Mercantile Insurance Company made the preliminary contract in good faith with the Traders' Fire Insurance Company, and used every effort to effectuate and consummate the same, and to induce the Traders' Fire Insurance Company to pay the consideration agreed. And that because of such default on the part of the Traders' Fire Insurance Company the North British and Mercantile Insurance Company should not be made to suffer."

⁴¹² This brief outline comprises a general statement of the principal defenses relied on by the North British company. We will now proceed to state the case made on behalf of the complainant policy-holders, and cannot do better in presenting their contention than to state the proposition formulated by their counsel, as follows:

1. This is not an ordinary case of technical insurance between two insurance companies. The facts found by the court of chancery appeals make it a contract for the use and benefit of complainants and other policy-holders of the Traders for a valuable consideration under circumstances entitling them to maintain this suit. The court of chancery appeals finds that the agreement and understanding was that the North British should "assume" all outstanding risks of the Traders, and place itself in the same position toward said policy-holders as if said policies had been its own; that the Traders went out of business,

and all of its assets, amounting to about eighty-five thousand dollars, went into the hands of the North British company, and the latter assumed all the fire risks of the former, and the North British dealt with the Traders policies the same as its own, canceling some, paying returned premiums, granting permits, adjusting and paying losses, and gave out statements by letters and agents that it had assumed all of said policies, and that nothing was necessary to be done by the policy-holders to make said contract binding on the North British company.

In order to show the full scope of the present suit, it ⁴¹³ should have been stated that the bill was filed in the nature of a general creditors' bill on behalf of complainants and all other policy-holders and creditors.

The chancellor was of opinion that the North British company was liable to complainants for the payment of their claims. He was also of opinion that the contract in question operated to transfer to the North British company practically all of the assets of the Traders' company, and that the latter company, having at once ceased to do business, all of its property became a trust fund for its creditors. He was further of opinion that the eighty-five thousand dollars was wrongfully paid by the Traders' company and received by the North British company; that it is a debt due the Traders' company, which its creditors are entitled to collect and appropriate to the payment of their debts pro rata.

The bill was therefore sustained as a general creditors' bill, and publication was ordered, together with a reference for an account. On appeal, the court of chancery appeals affirmed the decree of the chancellor. Defendant insurance companies again appealed, and have assigned errors.

Our first inquiry is to ascertain the facts of the case as found and established by the court of chancery appeals. That court finds that in the years 1899 and 1900 the Traders' and the North British companies were both carrying on an insurance business in Tennessee. W. J. Colburn & Co. were the general agents of the Traders' Insurance Company for the state of Tennessee, with an ⁴¹⁴ office at Chattanooga. In March, 1900, the insurance commissioner of Tennessee, for reasons satisfactory to himself, refused to renew the license of the Traders' company to do business in Tennessee. In 1900, Everett U. Crosby, the general agent of the North British company, advised W. J. Colburn & Co. by letter that the outstanding business of the Traders' company had been reinsured by the North British and

Mercantile Insurance Company. It appears that this letter was inclosed by Colburn & Co. to Insurance Commissioner Craig, who replied that this reinsurance in the North British Company would be entirely satisfactory to his department. The North British company on April 27, 1900, took charge of the business of the Traders' company, and from that date to August 2, 1900, received in installments the sum of eighty-five thousand dollars from the latter company.

The court of chancery appeals, through Judge Taylor, further finds that: "Notice of this reinsurance was published in the papers throughout the country, and it was given out by the North British company generally to all the former agents and policy-holders of the Traders. The North British company dealt with the Traders' policies as if they were its own, canceling some, paying returned premiums, granting permits, and paying losses, and giving out statements by letters and through its agents that it had assumed all of said policies, and that nothing was necessary to be done by the policy-holders to make said policies binding." That court finds: ⁴¹⁵ "There can be no question as to the undertaking of the North British company to reinsure policy-holders in the Traders' company, and to assume all liabilities and risks that had been incurred by the latter."

The court of chancery appeals further finds:

"On the 3d of August, 1900, the North British company attempted to cancel its contract with the Traders by letter as follows:

"Traders' Fire Insurance Co. of New York,

"33 Liberty Street, New York.

"Dear Sir: You will please take note that you have made default in the contract entered into between you and the North British and Mercantile Insurance Company of London and Edinburgh, bearing date twenty-seventh day of April, 1900. We do hereby declare said contract to be null and void.

"Very respectfully,

"NORTH BRITISH & MER. INS. CO. OF LONDON
AND EDINBURGH,

"By E. C. RICHARDS, Gen. Mgr."

"On the 7th of August, 1900, the North British company wrote W. J. Colburn & Co. that the former had ceased to act as agents of the Traders' company, and had canceled the contract with the latter company on Friday, August 3, 1900, because the Traders had failed to fulfill conditions precedent in the non-

payment of the consideration agreed. The court of chancery appeals finds that up to this time there had been no claim on the part of the North British company that it was simply acting as agent of the Traders' company, but, on the contrary, ⁴¹⁶ it had notified the general agents at Chattanooga that the North British had reinsured all outstanding liabilities of the Traders."

The opinion holds that: "The fact that there was a condition in said contract, if such existed, was not made public, or known to any of complainants, until the receipt of the letter to Colburn & Co. advising them that the North British company had ceased to act as agent of the Traders' company, and had canceled said contract. In fact, all the policy-holders, as far as the record discloses, were relying on the assurance of the North British company that they had been reinsured, and that the solvency of said company was such that they would be protected.

"It is insisted by the North British company that the directors of the Traders' company made false statements to the former in respect to the amount of returned premiums and its financial condition, and failed to make certain payments, which were conditions precedent to said contract. This fact, however, is established: that as early as June 15, 1900, the North British company knew all the facts concerning the Traders' company, and that the schedules of the business of the latter company recently issued by it were not complete, and the full amount of premium to be paid to the North British had not been ascertained. Yet the North British granted an extension of time to the Traders' company. Not only this, but it dealt with the policy-holders on the basis of a valid contract, without any conditions whatever. We ⁴¹⁷ also find that Colburn & Co. paid the Traders' company premiums for a number of complainants and others, amounting to several hundred dollars, after the time when the North British contracted with the Traders, and agreed to and did reinsure its policy-holders. It also appears that funds and accounts were in the hands of Colburn & Co. due the Traders' Insurance Company after May 1, 1900, which were held, as appears, until after the reinsurance of the Traders' liability in the North British Company, which were remitted to the Traders.

"Also, that Colburn & Co. paid all returned premiums when policies in the Traders' company were ordered canceled by the North British company. Among these was the claim of W. T. Crutchfield in the latter company, which was ordered canceled by letter to North British dated July 24, 1900. The returned

premiums were paid by Colburn & Co. W. J. Colburn & Co. forwarded the letter of August 7, 1900, from the North British company, denying liability on these Traders' policies, to Insurance Commissioner Craig, who wrote the North British company, and demanded that it retract this denial of liability, or he would revoke its license, by a date named.

"Thereupon the North British company brought suit against the insurance commissioner in the chancery court at Nashville, Tennessee, seeking to enjoin his proposed action; but the supreme court finally dismissed ⁴¹⁸ said bill, and sustained the insurance commissioner": North British Co. v. Craig, 106 Tenn. 621, 62 S. W. 155.

The court of chancery appeals also finds that: "As the result of the contract of April 27, 1900, the Traders' company went out of business, and all of its assets passed into the hands of the North British company, and that the latter assumed the fire risks of the Traders, and sent its special agent to Chattanooga, who informed W. J. Colburn & Co. that the North British company had reinsured all the liabilities of the Traders, and that the North British company realized out of the assets of the Traders about eighty-five thousand dollars (its entire assets), and paid losses of the Traders' company, with knowledge of its insolvency."

It should have been stated that the court of chancery appeals found that the North British company made several extensions to the Traders' company on payments due under said contract from May 31 to July 26, 1900, and at least two of these payments were made after the time limits had expired by the terms of the extension agreement.

It is unnecessary to quote further from the elaborate findings of the court of chancery appeals, since it is believed that the quotations made are sufficient to raise the question of law propounded on the appeal of the North British company. The fundamental proposition advanced on its behalf is that the contract of April 27, 1900, between it and the Traders' Insurance Company, ⁴¹⁹ was, in legal contemplation, a contract of reinsurance, and that its interpretation and effect must be governed by the rules of law applicable to that peculiar form of insurance. Reinsurance is defined to be "insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance"; or, as it is otherwise defined: "It is the contract that one insurer makes with another to protect the first from a risk he has already assumed": 24 Am. & Eng. Ency.

of Law, 2d ed., p. 248; *Iowa Ins. Co. v. Eastern Ins. Co.*, 64 N. J. L. 343, 45 Atl. 762.

The general rule is that "the ordinary contract of reinsurance operates solely between the insurer and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to the person originally insured": 24 Am. & Eng. Ency. of Law, 2d ed., p. 249, citing numerous cases.

To the same effect is our own case of *Royal Ins. Co. v. Vanderbilt Ins. Co.*, 102 Tenn. 267, 52 S. W. 168.

But an exception to this general rule is also well established—that a direct liability may be incurred by the reinsurer to the originally insured if the intention to create it sufficiently appears from the contract of reinsurance: 24 Am. & Eng. Ency. of Law, 2d ed., p. 249.

It is further said in this valuable work that: "The ⁴²⁰ general rules of construction applicable to contracts and written instruments apply to contracts and policies of reinsurance. A contract of this character, like any other contract, depends upon the intention of the parties, to be gathered from the words used in the instrument, taking into consideration, when the meaning is doubtful, the circumstances attending the transaction. The court should give to the instrument a reasonable and sensible construction, and one which appears to conform the nearest to the justice of the case, and the purpose which the parties meant to accomplish. The contract should receive a construction that will be uniform throughout the various transactions in which it is involved. It must be so construed as to have a certain meaning in one way for the purpose of collecting premiums, and in another for the purpose of determining liability": 24 Am. & Eng. Ency. of Law, 2d ed., p. 254.

In the same work it is said: "While, as a general rule, the liability of the reinsurer is solely to the reinsured, it is competent for the reinsurer to make the reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions where a third party is allowed to maintain an action on a contract made for his benefit he may, in such a case, recover directly from the reinsurer. Thus where, in reinsuring risks for which policies are outstanding, the reinsurer contracts with the reinsured to assume the policies and to pay the holders thereof all such sums ⁴²¹ as the reinsured may become

liable to pay, the persons to whom these original policies are payable acquire a direct right of action against the reinsurer, and can sue in their own names, and recover upon the contract of reinsurance, and it is immaterial that they are not named in the policy or contract. . . . The holder of an original policy of insurance acquires a right of action on a contract of reinsurance, where the original insurer sells its business and goodwill to another person, and the latter company, in consideration thereof, reinsures the risks of the first company, and contracts to pay the losses under the first company's outstanding policies": 24 Am. & Eng. Ency. of Law, 2d ed., p. 258; *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Alliance Mut. Ins. Co. v. Welch*, 26 Kan. 641; *Barnes v. Hekla Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314; *Glen v. Hope Mut. Ins. Co.*, 56 N. Y. 379; *Fisher v. Hope Mut. Ins. Co.*, 69 N. Y. 161; *Shoaf v. Palatine Ins. Co.*, 127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151, 45 N. W. 703, 8 L. R. A. 769; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414; *Hunt v. New Hampshire etc. Ins. Assn.*, 68 N. H. 305, 73 Am. St. Rep. 602, 38 Atl. 145, 38 L. R. A. 514; *Chalaron v. Insurance Co. of North America*, 48 La. Ann. 1582, 21 South. 267, 36 L. R. A. 742; *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508, 22 N. E. 756, 6 L. R. A. 610.

In the case of *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414, the syllabus is as follows: ⁴²² "The plaintiff held a policy of insurance in the Standard Fire Office of London. That company sold to the Phenix Insurance Company its entire business in the United States, and the goodwill thereof, together with the other property, and the latter company, in consideration thereof, reinsured all the risks of the Standard company upon property situated in the United States, and agreed that all losses arising under the policies of that company on such property should thereafter be borne by the Phenix Company, and be paid, satisfied and discharged by it." Held, that plaintiff could maintain an action against the Phenix company for a loss arising under his policy.

In the course of the opinion the court said: "The contention is that the contract between the two companies is confined strictly to them, and that the plaintiff, under his policy issued by the Standard, has no privity in the contract made by the Phenix, and can maintain no action thereon against the Phenix; in other words, that it was strictly a contract of reinsurance

by the Standard company solely for its own benefit, and not for the benefit of any of its then existing policy-holders in the United States. . . . But in the case before us the contract between the defendant companies is, as it seems to us, something more than a reinsurance. By that contract the Standard company sold and turned over to the Phenix its entire business, and the goodwill of that business in the United States, together with a large amount of bonds and other property, in consideration ⁴²³ of which the Phenix thereby reinsured all the risks of the Standard company upon property situated in the United States, . . . and agreed that all losses arising under the policies of the said defendant Standard Fire Office, Limited, upon property situated in the United States of America, should, after that time, January 1, 1884, be borne by the said Phenix Insurance Company, and should be paid, satisfied, and discharged by it; . . . and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied and discharged by said Phenix Insurance Company, which thereupon became the owner of the goodwill, original documents, and books of its codefendant herein, the Standard company, relating to the risks aforesaid, and assumed control of the same and of the business pertaining to said risks, policies and losses. Such are the alleged terms of the contract we are required to construe. The losses thus arising under the policies could only be borne, paid, and discharged by the Phenix in a direct transaction with the policy-holders. Even a payment by it of the amount of the loss of the Standard company would not satisfy or discharge the plaintiff's claim for such a loss on his policy. That could only be done on payment to the plaintiff. It seems to us that by the terms of the contract as alleged, the Phenix, in effect, thereby assumed the risk covered by each policy, and agreed to pay any loss arising under each policy. The mere fact that the plaintiff was not named in the contract ⁴²⁴ does not preclude him from maintaining an action upon the contract": *Shoaf v. Palatine Ins. Co.*, 127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451.

In *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314, the principle that a simple contract of reinsurance between insurance companies is a contract of indemnity, and is solely for the benefit of the latter, is recognized, but it is said: "Where such a contract also includes a promise or agreement to assume and pay the losses of policy-holders, actions in case of loss may be brought by them directly against the reinsurer upon such promise or undertaking."

In *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. 897, the same doctrine is thus stated in the syllabus: "The assumption of all the fire insurance policies of an insurance company by a new company is much broader than a mere naked contract of mere reinsurance under the code; and a holder of a policy issued by the former company sufficiently manifests his consent to the contract by which the payment of the policy is assumed by bringing an action against the new company upon the policy. The law creates the privity necessary for the maintenance of the action."

In that case the court said: "The facts in this case show the contract in question to be much broader than a mere technical reinsurance."

⁴²⁵ Mr. Wood, in his work on Insurance, says: "The question as to whether the insured may sue the company on the risk reinsured depends upon the circumstances whether in the state where the policy was issued the person for whose benefit it was made may bring suit thereon, although not named in the contract, and whether it was the intention of the parties that the insurance company should stand in the place of the insurer with the assured."

What, then, is the application of these principles in the present case? The court of chancery appeals finds:

"1. The Traders' Fire Insurance Company went out of business, and all of its assets went into the hands of the North British and Mercantile Company, and the latter assumed the fire risks of the former, and sent its special agent to Chattanooga, who informed W. J. Colburn & Co. that the North British company had reinsured all the liabilities of the Traders.

"2. The Traders' company went out of business—a fact known to the North British company—and under the contract of April 27th paid to the latter company all of its assets, amounting to about eighty-five thousand dollars. The North British company also paid the losses of the Traders' company with knowledge of its insolvency.

"3. In this case, without consulting the policy-holders of the Traders' company, the North British company did assume all risks of the Traders' company, and occupied by their act the relations that previously existed ⁴²⁶ between the Traders' Insurance Company and its policy-holders, and thereby became liable to said policy-holders, and can be proceeded against by them just as they could have proceeded against the Traders' company. The North British company cannot make a contract

agreeing to reinsure these policy-holders, and then, because the contract is not as good as they thought, repudiate it to the detriment of the rights of these complainants.

"4. According to the proof and facts in this case the North British Insurance Company did agree and promise to assume all the risks and liabilities of the Traders' company, took the assets of the latter, and on account of its alleged default of a condition of which the policy-holders knew nothing, and when it is rendered insolvent, it shields itself behind the contention that complainants cannot sue them. This promise or contract was made upon sufficient consideration, and for the benefit of these complainants, policy-holders of the Traders' company, although they were not parties to the contract. This contract between these two insurance companies was based upon a consideration, and a part of it was for the benefit of these complainants and others who were not parties to it, and hence can be enforced.

"5. The agreement of reinsurance was not for a part, but the whole, of the risks taken previously by the Traders, and the effort is to bind the reinsurers to make good the losses of the original insurer to its policy-holders.

"6. In the case at bar it was a reinsurance of all the 427 Traders' policies, and an assumption by the North British company of all liabilities, and was a promise made by it to the Traders, based upon a sufficient consideration, for the benefit of its policy-holders, who were not parties to the contract.

"7. Admitting, however, that the contract of April 27, 1900, was a conditional one, as insisted, has not the North British and Mercantile Company, by its conduct, waived the same, by granting the extensions hereinbefore noticed, and by the statements of its managers and agents to policy-holders, and publications, and its conduct of the business of the Traders, and its assurances to them? Said company held itself out to the public by letters, the acts of its agents, and its own conduct, as assuming all risks, without condition, and by so doing waived any that might have existed.

"8. The fact that there was a condition in said contract, if such existed, was not made public, or known to any of the complainants, until the receipt of the letter attempting to cancel the contract. In fact, all the policy-holders, as far as the record discloses, were relying on the assurances of the North British company that they had been reinsured, and that the solvency of said company was such that they would be protected.

"9. The fact is established that as early as June 15, 1900, the North British company knew all the facts as to the insolvency of the Traders' company, and that the schedules of the business of the latter company were not ⁴²⁸ completed, and the full amount of premiums to be paid the North British had not been ascertained; yet they gave an extension of time to the Traders' Insurance Company, and dealt with the policy-holders on the basis of a valid contract, without any condition whatever."

Upon the facts found by the court of chancery appeals, which are conclusive and binding upon this court, we are constrained to hold that the contract of April 27, 1900, between the Traders' and the North British companies was not an ordinary contract of reinsurance. It was rather an assumption on the part of the North British company of all of the outstanding liabilities against the Traders' company preparatory to the retirement of the latter permanently from business. As evidence of this fact, the Traders' company, in consideration of this assumption of liability on the part of the North British company, transferred to the latter company its entire assets, amounting in value to about the sum of eighty-five thousand dollars. It was not contemplated by either party at the time of the execution of this contract that the Traders' company would go forward with its business, collecting premiums and adjusting losses in the ordinary way. It was known to be wholly insolvent, and the acceptance by the British company of the entire assets of the former had disabled it from the fulfillment of its contracts of insurance with its numerous policy-holders. While the alleged contract of reinsurance provides on its face that it is to be null and void upon the failure of the Traders' company to pay the deferred payments, yet the outstanding policy-holders who had been deprived of the assets of the Traders' ⁴²⁹ company as a security and indemnity for their individual losses could not be prejudiced by such a conditional defeasance whereof they had no knowledge. In other words, the North British company, by taking over the entire assets of the Traders' company, had disabled the latter company from complying with its contracts made with its policy-holders, and the British company cannot be heard not to say that it is not liable to these policy-holders.

We are not advised of any case which adjudges that facts like these constitute a technical reinsurance contract, and that policy-holders, by reason thereof, are remediless against the

guaranteeing company, and must look for indemnity against an insolvent company, whose entire assets have been appropriated by the reinsuring company, and the former thereby rendered permanently insolvent. In Tennessee the doctrine is firmly established that the beneficiary, though not a party to the contract, may maintain an action directly in his own name against the promisor, where such promise between the promisor and the promisee is made upon sufficient consideration for the benefit of the third party: *Bedford County v. Nashville etc. Ry. Co.*, 14 Lea, 525; *McCarty v. Blevins*, 5 Yerg. 196, 26 Am. Dec. 262; *Moore v. Stovall*, 2 Lea, 543; *O'Connor v. O'Conner*, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33; *Thompson v. Thompson*, 3 Lea, 126; *Mills v. Mills*, 3 Head, 711; *Lookout Mountain R. R. Co. v. Houston*, 85 Tenn. 224, 2 S. W. 36.

The result is the decree of the court of chancery appeals must be affirmed.

Contracts of Reinsurance and the remedies of the parties are discussed in the monographic note to *Barnes v. Hekla Fire Ins. Co.*, 45 Am. St. Rep. 442-451. As to the general nature of such contracts, see the subsequent case of *Hunt v. New Hampshire Fire etc. Assn.*, 68 N. H. 805, 73 Am. St. Rep. 602. And as to the right of the original policy-holders to sue the reinsurer to recover a loss when they are not parties to the contract of reinsurance, see *Shoaf v. Palatine Ins. Co.*, 127 N. C. 308, 80 Am. St. Rep. 804.

The Right of a Third Person to sue on a contract made for his benefit is the subject of a monographic note to *Baxter v. Camp*, 71 Am. St. Rep. 176-207.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

ZIRCLE v. SOUTHERN RAILWAY COMPANY.

[102 Va. 17, 45 S. E. 802.]

PUBLIC USE—Railroads.—If the use to be subserved by building a branch railroad is a public use, the fact that such road will inure to the advantage of a particular individual, or class of individuals, does not render the use any the less public. (p. 807.)

PUBLIC USE—Railroads.—Whether the use to which a railroad is put is public or not may be determined by the fact that, where the use is public a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it cannot be deprived by the company without a reasonable excuse, and also by the fact that the state retains the power to regulate and control the franchises of the company and to prescribe the amount of tolls and charges which it may lawfully collect. (p. 807.)

EMINENT DOMAIN—Exercise of Right of by Railroads.—If the legislature expressly delegates to railroad companies the power of eminent domain, such companies in the exercise of that power represent the sovereignty of the state, and may decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within such limitations their discretion is practically absolute, and while it is competent for the courts to supervise the exercise of the power delegated, they cannot invade the bounds set by the legislature, and will not undertake to control the discretion of the railroad companies in taking property for their use, unless there has been a very clear abuse of power. (pp. 807, 808.)

EMINENT DOMAIN—Public Use.—A railway built for the purpose of reaching an industrial enterprise is for a public use, and the railroad company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it. (p. 809.)

EMINENT DOMAIN—Legislative Question.—The question of the necessity, propriety or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional prohibition, is a legislative and not a judicial question. (p. 809.)

Bennick & Williamson and J. W. Bauserman, for the plaintiff in error.

H. H. Downing, for the defendant in error.

¹⁸ WHITTLE, J. This is a writ of error to an order of the county court of Shenandoah county, condemning two and three-tenths acres of land, the property of the plaintiff in error, Abram Zirle, for the purposes of the defendant in error, the Southern Railway Company, in constructing a branch road or spur track, springing from a point on the Manassas branch of the Southern railway, near Forrestville, and extending a distance of two-thirds of a mile, to Manor Mills.

The act under which these proceedings were had provides that: "The president and directors of any company incorporated to construct a railroad or other work of internal improvement may cause to be made in connection therewith, or may purchase branch railroads or lateral works not exceeding five miles each way in length, and under a resolution adopted in general meeting by two-thirds of all the votes of all the stockholders, may cause to be made, or may purchase branch railroads ¹⁹ or lateral works not exceeding twenty miles in length": Acts 1897-98, p. 172.

It is insisted by plaintiff in error that the county court was without jurisdiction in the premises, for the following reasons: 1. Because it does not appear that the resolution provided for in the foregoing statute was ever adopted by the stockholders; and 2. Because the Southern Railway Company, after it had determined to construct the branch road or spur track in question, made no attempt to purchase the land in controversy before instituting condemnation proceedings as required by section 1074 of the code. In respect to these contentions, it is sufficient to remark, of the first, that the requirement referred to has no application where, as in this case, the branch road or lateral work does not exceed five miles in length; and of the second, that it is not sustained by the evidence. The controlling question in the case involves the power of the Southern Railway Company to condemn the land in controversy for the purpose indicated. The contention of plaintiff in error in that regard is that the object of the proceeding was to build a spur track to a private enterprise, Manor Mills, whose output the railway company already handled, for the sole benefit and convenience of the owners of that property. In other words, that it was an attempt on the part of the railway company to con-

demn private property for private use, and was, therefore, without sanction of law.

While the agreement between the railway company and the mill company justifies the conclusion that the primary object in constructing the spur track was to reach that industry, it also appears that it was for the use of the railway company and third parties (the public, who might choose to patronize the railway company) as well. The circumstance that the mill company agreed, in the first instance, to contribute a certain ²⁰ amount to the cost of constructing the track, does not affect the legal aspect of the case. The contract stipulated that the sum so advanced was to be returned by the railway company, which was to become the absolute owner of the property. So that the transaction, in legal effect, amounted merely to a loan by the mill company to the railway company.

The authorities practically speak with one voice to the effect, that if the use to be subserved is a public use, the fact that the branch road inures to the advantage of a particular individual, or class of individuals, will not render the use any the less public.

Indeed, it is a matter of common observation, that the possibility of reaching industrial enterprises along the proposed route of a railway is a legitimate and important factor in determining the question of location.

Lewis, in his work on Eminent Domain, at section 165, says: "‘Public use’ means the same as ‘use by the public.’" The test whether a use is public or not may be determined by the fact that, where the use is public, a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it cannot be deprived by the company without a reasonable excuse. And by the further fact that the state retains the power to regulate and control the franchises of the company, and to prescribe the amount of charges and tolls which it shall be lawful for the company to exact for the transportation of passengers and freight.

The legislature has expressly delegated to railway companies the power of eminent domain. In the exercise of that power they represent the sovereignty of the state, and decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within those limitations, their discretion is practically absolute.

It is competent for the courts to supervise the exercise of the power delegated, but they cannot invade the bounds set by the

²¹ legislature; and will not undertake to control the discretion of the companies in taking property for their use, unless there has been a very clear abuse of power: *St. Louis etc. Ry. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434, 21 S. W. 884.

In that case the supreme court of Arkansas, speaking through Cockrill, C. J., says: "The appellee argues that the proof shows that the railway's proceeding to condemn is prosecuted, not for its own use, but for the use and benefit of the Western Coal and Mining Company—a corporation which owns and operates a coal mine near the appellant's line of railway. The managers of the railway were probably instigated by the coal company to institute the condemnation proceeding, and they doubtless intended that the coal company should derive a benefit therefrom. But those facts alone do not furnish a legal reason sufficient to warrant judicial interference with the power delegated to the corporation by the legislature. If the land is needed for legitimate railroad purposes, the motive which influenced the railway managers in undertaking the work will not take from it its public character. A proposed public user will not be enjoined by the courts upon the ground that it will further private interests. . . . To be public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user." The language of the learned judge in that case is peculiarly applicable to the facts in the case under consideration; and the doctrine there laid down finds distinct expression in numerous decisions cited in the opinion and in an exhaustive note to the case.

The annotators, in referring to the cases of *Kyle v. Texas etc. Ry. Co.* (Tex. App.), 4 L. R. A. 275, and *Pittsburg etc. Ry. Co. v. Bentwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, relied on by plaintiff in error as sustaining a contrary doctrine, observe: "These two cases are plainly in direct conflict with the cases cited in the former part of this note. Indeed, the court, in *Kyle v. Texas etc. Ry. Co.* (Tex. App.), 4 L. R. A. 275, expressly adopted the views expressed in a dissenting opinion delivered by Judge Trunkey in *Gett's Appeal*, supra.

The reports abound with decisions to the effect that a railway built for the purpose of reaching an industrial enterprise is for a public use, and the company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it: *Chicago etc. Ry. Co. v. Morehouse*, 112 Wis. 1, 88 Am. St. Rep. 918, 87 N. W. 849, 56 L. R. A. 240, and cases cited in opinion and notes; 2 *Minor's Institutes*, 4th ed., 25; 1 *Wood's Railway Law*, 648-653.

As remarked, the question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional provision to the contrary, is a legislative and not a judicial question: *Alexandria etc. Ry. Co. v. Alexandria etc. Ry. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Roanoke v. Berkowitz*, 80 Va. 616; *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

In a very recent case this court had occasion to observe that the visitatorial powers of a court over a private corporation do not authorize the substitution of its business judgment for that of the corporation: *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

It is plain from the authorities that the order complained of is without error, and it is affirmed.

USES FOR WHICH THE POWER OF EMINENT DOMAIN CANNOT BE EXERCISED.

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Scope of Note.

In this note we shall consider the general principles of the right of eminent domain only to the extent necessary to show the application of those principles to those cases wherein it was held that the uses for which the property sought to be condemned under the right of eminent domain were not of that public character necessary for the exercise of the right. And in considering the uses for which the right cannot be exercised, we shall only consider those cases dealing with an attempt to actually take the property, and not those cases which involve what might be called a constructive taking. Neither shall we consider those cases which involve the constitutionality of laws authorizing the laying of taxes for purposes not public in character (*Hancock Stock etc. Co. v. Adams*, 87 Ky. 417, 9 S. W. 246), or laws affecting the disposition of public property or funds in so far as they devote such property or funds to purposes not public in character (*Van Witson v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. B. A. 403; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395), or laws making it a criminal offense to dispose of property already in existence, as was done in *People v. Van De Carr*, 178 N. Y. 425, ante, p. 516, 70 N. E. 965, wherein a law prohibiting the sale of goods having thereon a representation of the flag was held unconstitutional, in that it took away private property without compensation because of its application to such goods then in existence. Various phases of the right of eminent domain have been discussed on previous occasions, such as the right to condemn lands for a private way or road in the note to *Sherman v. Buick*, 91 Am. Dec. 585; what is a taking of property for public use in the monographic note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 610; condemnation of property of corporations under the power of eminent domain in the note to Appeal

of Sharon Ry. Co., 9 Am. St. Rep. 137; the question whether the existence of a public use was a matter for the court or the legislature was treated exhaustively in the notes to *Lyach v. Forbes*, 42 Am. St. Rep. 406; *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 931; the extent of compensation allowable for property so taken was discussed in the notes to *Sheehy v. Kansas etc. Ry. Co.*, 4 Am. St. Rep. 399; *Gainesville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 48; *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 291; while the right to transfer franchises obtained by means of the right of eminent domain was treated in the note to *Brunswick etc. Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 390.

I. Nature of the Right of Eminent Domain.

The existence of the right of eminent domain has been recognized throughout the civilized world, but its exercise has been restricted to cases of public necessity and made dependent upon just compensation: *People v. White*, 11 Barb. 30. See, also, *Grotius De Jur. B. & P.*, b. 8, c. 14, sec. 7, *Puf. De Jur. Nat. et Gent.*, b. 8, c. 5, sec. 7; *Bynckershoeck Quaert. Jur. Pub.*, b. 2, c. 15; 1 *Blackstone's Commentaries*, 139; 2 *Kent's Commentaries*, 339. The right of eminent domain has been defined as the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. The authority springs from no contract or arrangement between the government and the citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity, and is recognized, and may be defended and enforced upon the ground that no government could perpetuate its existence and further the prosperity of its people if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals. The right being thus found to rest upon necessity, the power to appropriate in any case must be justified and limited by the necessity; hence whenever the government or its officials attempt to seize and appropriate property which cannot be needful to the due execution of its sovereign powers or the proper discharge of any of its public functions, the owner has the same means of resistance and legal redress as would have been available had the act been done by an individual instead of the government or by virtue of its authority: *Trombley v. Humphrey*, 23 Mich. 471; *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190. So, also, it has been said to be the right of the sovereign, without the consent of the owner, to make private property subservient to the public welfare, when necessary. It, however, rests upon public necessity and is as broad, but no broader, than that necessity. Thus, if the wants of the public may be attained by the acquisition of an easement, nothing more can be taken, but if the

whole interest is required, the whole may be appropriated: *Giesy v. Cincinnati etc. Co.*, 4 Ohio St. 308; *State v. Farrelly*, 36 Mo. App. 282. Hence, the courts declare it to be an inherent sovereign power: *Johnson v. Joliet etc. Co.*, 23 Ill. 202; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *People v. White*, 11 Barb. 26; *Hollister v. State (Idaho)*, 71 Pac. 541. It remains in the aggregate body of the people in their sovereign capacity, to be resumed by them in conformity with the organic and statutory law whenever the public interests demand: *Hartwell v. Armstrong*, 19 Barb. 166; *People v. New York*, 32 Barb. 102.

II. Distinguished from the Taxing and Police Powers.

The exercise of the right of eminent domain and the exercise of the taxing power, though somewhat alike, are not the same. The distinction is said to lie in the fact that taxation operates upon a community or upon a class of persons in and by some rule of apportionment, whereas the exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals; and also in the idea that taxation exacts money or services from individuals as and for their respective shares of contribution to the public burdens, whereas the private property taken for public use by right of eminent domain is taken as something beyond the owner's share, and hence in the latter case he is entitled to receive compensation therefor: *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276.

In *Aitken v. Wells River*, 70 Vt. 308, 67 Am. St. Rep. 672, 40 Atl. 829, 41 L. R. A. 566, the court held that the destruction of property to avert an imminent public injury is not a taking for a public use, and is, in no legal sense, an exercise of eminent domain. It held that the former was an exercise of the police power, while the latter was based on constitutional grounds. The court also said that the taking of property for a public use can await the forms and delays of the law, but the destruction of property to prevent imminent public injury is governed by necessity which knows no law. The same distinction was also observed in *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613. In *Philadelphia v. Scott*, 81 Pa. St. 80, 22 Am. Rep. 738, the court, in discussing the distinction between the right of eminent domain and the police power, said: "In their leading features these powers are plainly different, the latter reaching even to the destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in case of nuisance tending to breed disease. In the first instance, the community proceeds on the ground of the overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise

in other directions, and it is generally based on disaster, fault, inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility." Substantially the same distinction was observed in *Livingston v. Ellis County*, 30 Tex. Civ. 19, 68 S. W. 723. But the fact that the taking of land for the erection of a hospital for persons suffering from contagious diseases was sanctioned by the police power does not prevent it from being also an exercise of the right of eminent domain: See *Manning v. Bruce* (Mass.), 71 N. E. 537. The destruction of buildings to prevent the spread of a fire is generally considered an exercise of the police power, and not that of eminent domain: See note to *Hale v. Lawrence*, 47 Am. Dec. 190.

III. When Right of Eminent Domain may be Exercised.

The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public or some portion of it; and not the use by or for particular individuals or for the benefit of certain estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common: *McQuillen v. Hatton*, 42 Ohio St. 202; *Loughbridge v. Harris*, 42 Ga. 500; *Nesbitt v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522; *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Hancock Stock etc. Co. v. Adams*, 87 Ky. 417, 9 S. W. 246; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Dickey v. Tennison*, 27 Mo. 373; *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559, 22 L. R. A. 496; *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Dunham v. Williams*, 36 Barb. 136; *Bennett v. Boyle*, 40 Barb. 551; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Matter of Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303; *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67, 19 Pac. 78; *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371; *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195; *Fallsburg etc. Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L. R. A. 662.

IV. What Constitutes a Public Use.

a. *In General*.—In *Dayton etc. Co. v. Seawell*, 11 Nev. 400, Chief Justice Hawley remarked that: "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of

the words 'public use,' as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten paths of precedent to which courts, when in doubt, seek refuge here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting that no matter which road the court may take it will be sustained and opposed by about an equal number of the decided cases. In this dilemma the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it." And in *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, the court, in referring to the presentation of the views of other courts on the question of public use, said: "In considering these opinions it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision." It has been said that the term "public use" is synonymous with public benefit or advantage: *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Dayton etc. Co. v. Seawell*, 11 Nev. 394. But in *Matter of Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429, it was said that the expressions "public interest" and "public use" are not synonymous. The term "public use" is a rather flexible one; hence the courts have avoided a positive definition lest it prove an embarrassment in subsequent cases and work a mischief in practical application: *Ryan v. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303; *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. The public use required need not be the use or benefit of the whole public or state or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common. The use is also said to be public when it promotes the interests of a considerable portion of the community, although, as we have seen, it may not benefit the community at large: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853. See, also, *Lux v. Haggin*, 69 Cal. 304, 10 Pac. 674; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376; *Foster v. Park Com.*, 133 Mass. 321; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569; *Wurts v. Hoagland*, 114 U. S. 606, 15 Sup. Ct. Rep. 1086, 29 L. ed. 229. In *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L. R. A. 662, it was stated that though

the property taken by the right of eminent domain is vested in the private individuals or corporations thus acquiring it, still the public retain certain definite rights to its use and enjoyment, and to that extent it remains under control of the legislature. But that if no such rights are secured to the public, the property is not taken for public use. In *Gaylord v. Sanitary District*, 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, it was held that to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement, and the public must to some extent be entitled to enjoy the property as a right and not a mere favor. In *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, which is perhaps one of the latest cases discussing what is a public use, the court said: "There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempt to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law where the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in harmony with enlightened public policy, and that the liberal interpretation given the term 'public use' which the legislature has, in effect, declared shall be followed in this state is far more conducive to individual and public advancement than the restricted construction adopted and followed by the line of decisions first referred to." So, also, in *Fallsburg etc. Mfg. Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, it was held that to justify the exercise of the right of eminent domain, the general public must have a definite and fixed use of the property to be condemned; a use independent of the private person or corporation in whom the title to the property, when condemned, will be vested, and such a public use as cannot be defeated by such private owner, but which continues to be guarded and controlled by the general public through the legislature; such public use must be clearly a needful one for the public, and one which cannot be given up without obvious general loss and convenience; it must also be impossible, or very difficult, at least, to secure the same public use and purpose otherwise than by authorizing the condemnation of the property.

In *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394, the court, in holding that the condemnation of a strip of land for the purpose of trans-

porting wood, lumber and other materials to a mine was for a public use, because mining was one of the leading industries of the state, announced the broad doctrine, that any appropriation of private property for any purpose of great public benefit, interest or advantage to the community is a taking for public use.

The doctrine announced in this case, was, however, criticised in *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, as being a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. The court, after remarking that the constitution was the fundamental law and that its enactments, whether in the nature of grants or limitations, were presumed to be stable and uniform, and to constitute a check on the unstable sentiments and actions of members of different legislatures, drew a distinction between the idea of public policy and public use. The court, in this connection, said: "It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity, that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy." The court then held that the use necessary to form a basis for the exercise of the right of eminent domain must be either a use by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or the general prosperity of the state. Somewhat the same line of reasoning in regard to making public utility the main constituent of "public use" was employed in *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313. For a further discussion of this subject see, also, the following subdivisions. In *Appeal of Edgewood R. Co.*, 79 Pa. St. 269, it was said that the use must be a present public advantage, and not contingent upon the success of the projected speculation. So, also, in *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, it was held that the power of eminent domain cannot be invoked on the theory that if the petitioner fails to give equal advantages to

all, a forfeiture would be worked, since the condition which makes a use public must exist at the time of the taking.

But the fact that an undertaking is instituted with a primary view of private profit does not make it a private use where it is in fact impressed with a public use: *Ryan v. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. And the right of eminent domain also excludes the idea that property may be taken for private use or under semblance of public use, and immediately or ultimately conveyed and appropriated to private uses: *Dunham v. Williams*, 36 Barb. 136.

b. *Effect of Local or Changed Conditions on Public Use.*—What is a public use depends on the varying demands and needs of society as constituted at the time of determining the question. Many improvements now universally recognized as being impressed with a public use were not so recognized not many years ago, and, on the other hand, it might also be said that some things which were formerly recognized as being impressed would in the light of present improvements not now be recognized as constituting a public use: *Scudder v. Trenton etc. Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Ryan v. Terminal Co.*, 102 Tenn. 118, 50 S. W. 744, 45 L. R. A. 303; *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195. The term "public use" is said to be flexible, and that it cannot be limited to the public use known at the time of the forming of the constitution. Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities is said to be a public use: *Stewart v. Great Northern Ry. Co.*, 65 Minn. 517, 68 N. W. 208, 33 L. R. A. 427. In *Dalles Lumbering Co. v. Urquhart*, 16 Or. 71, 19 Pac. 78, the court said: "The nature of the work or improvement, the surrounding circumstances and conditions, and the general policy of the state appear to have frequently exercised a controlling influence on the subject. In some of the states it has been closely restricted, while in others it has been more liberally construed. The industries of this state are in their infancy, and its resources are comparatively undeveloped, and we would hesitate before laying down a rule of construction that might retard the growth or development of either. The public certainly have an interest in the cheap delivery of the timber, lumber and other products of the forest, or whatever other commodity may be transported by being floated to cities or other places for consumption. So in many parts of the state the use of water for purposes of irrigation is of great utility. By its use the 'desert is made to blossom,' and large sections of waste and unproductive land may be reduced to a state of fertility and productiveness, thus adding materially to the wealth, population and general resources of the state. For these purposes, as well as more enlarged systems of navigation by boats, canals may be useful and necessary, and in such cases it is not per-

ceived why the power of eminent domain may not be invoked. These and other like improvements may be of just as much public utility as railroads, plank roads, clay roads, or bridges, and the like, in furtherance of which the power is frequently exerted without a question." Similar views were expressed in the very recent case of *Highland Boy Gold Min. Co. v. Strickley* (Utah), 78 Pac. 296, wherein it was said: "There appears to be an irreconcilable conflict in the authorities as to what constitutes a public use. This, no doubt, is largely due to the fact that in many cases what would be a public use in one jurisdiction would not be in another or different jurisdiction. Thus it has been almost uniformly held throughout the Pacific coast states that the construction and operation of irrigation ditches is a public use, which doctrine, when applied to the arid region, has been approved by the supreme court of the United States, whereas in Ohio, New York, Pennsylvania and other states where irrigation is not followed, and is practically unknown, it would undoubtedly be held not a public use. Therefore, what shall be considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the nature and character of the natural resources of such locality, state or commonwealth." Substantially the same views were expressed in *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Ryan v. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. The magnitude of the interests to be benefited has been held to be of great importance in determining whether the proposed use is of such a public character as to warrant the exercise of the right of eminent domain: *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394; *Overman etc. Co. v. Corcoran*, 15 Nev. 147; *Douglas v. Byrnes*, 59 Fed. 31; *Hand Gold Min. v. Parker*, 59 Ga. 419. Thus in *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 504, it was held that in a state where mining is the dominant industry, the magnitude of the interests involved properly became a determining factor in sustaining the right of a railroad to construct lateral branches, tracks and spurs to mines and mining works, since it was such a public use as authorized the exercise of eminent domain.

Although the consideration of the benefits accruing to the community from the standpoint of public policy was criticised in *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681 (discussed in the preceding subdivision), the consideration of such benefits in applying the doctrine of eminent domain has by no means been confined to the western states, whose decisions have been adverted to. Thus, in *Hazen v. Essex Co.*, 12 Cush. 475, it was held that where the general public advantage was greatly promoted by improvements of natural water powers that the use was public; and in *Moore v. Sanford*, 151 Mass. 286, 24 N. E. 323, 7 L. R. A. 151,

the improvement of Boston harbor by the reclamation of a large body of land for commercial purposes was held to be of great public advantage. In *Stewart v. Great Northern Ry. Co.*, 65 Minn. 517, 68 N. W. 208, 33 L. R. A. 427, the court having in view the magnitude of the agricultural interests of that state, held that the building of grain elevators was a public use. The principles underlying these cases was substantially asserted in the celebrated case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. And in *Great Falls Mfg. Co. v. Fernold*, 47 N. H. 444, the court adverted to the great interest which the state of New Hampshire had in the improvement of her water powers, and to the great commercial prosperity arising to her citizens from the development of those natural resources. So, also, in *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 766, the court in holding that the creation of a water power to be used by a corporation or leased by it to individuals for the purpose of establishing extensive manufactories in a populous district was a public benefit, adverted to the manufacturing industries fostered in the neighboring city of Paterson, through such a use of its water power. A somewhat different view was entertained by the court in *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, wherein it was held that the use must be one which the public, to some extent, have a right to use, and not one which is merely a benefit to the public. In that case the court held a law authorizing the condemnation of private property for the purposes of public machinery other than public gristmills void as permitting the taking of property for a private use. As bearing on the argument against the condemnation of land for the purposes of public mills, see, also, *Loughbridge v. Harris*, 42 Ga. 500; *Sadler v. Langham*, 34 Ala. 311; *McCulley v. Cunningham*, 96 Ala. 583, 11 South. 694; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Harding v. Goodlet*, 3 Yerg. (11 Tenn.) 41, 24 Am. Dec. 546; *Tyler v. Beecher*, 44 Vt. 648, 8 Am. Rep. 398.

c. Effect Where Use is Enjoyed Only by Limited Number.—It does not seem to be controverted that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material in applying the doctrine of eminent domain: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298; *Talbot v. Hudson*, 16 Gray, 417; *Philips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Shaver v. Starrett*, 4 Ohio St. 496.

d. Effect Where Public Use is Incidental to Private Use.—Where the substantial benefit from the appropriation of lands under the right of eminent domain is for the benefit of a private individual, and the benefit to the public is only incidental and purely prospective, the

use is not a public use: *Stratford v. Greenboro*, 124 N. C. 127, 32 S. E. 394; *Berrien Springs etc. Power Co. v. Berrien* (Mich.), 94 N. W. 379; *Byersan v. Brown*, 35 Mich. 383, 24 Am. Rep. 564; *Attorney General v. Eau Claire*, 37 Wis. 437. In the case of *Berrien Springs etc. Power Co. v. Berrien* (Mich.), 94 N. W. 379, the plaintiff sought to condemn certain land for the purpose of constructing a dam whereby a water power would be created. The plaintiff was a corporation organized for the purpose of using the water power to be so created for mining, manufacturing, domestic, municipal, agricultural and navigation purposes, and also to furnish the people in the vicinity with electricity for lighting and other purposes. The court held that the public use was merely incidental to the main purposes of the contemplated use. The principle was substantially asserted in *Avery v. Vermont Electric Co.*, 75 Vt. 240, 98 Am. St. Rep. 818, 54 Atl. 179, where the court held that the application of water power to the generation of electricity for use as the motive power of a railway was not a public use, even though the operation of the railroad was a use of a public character: See, also, the cases collected in the note to *Beakman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686. Of course, the mere fact that private interests will incidentally be benefited by the exercise of the right of eminent domain is immaterial if the purpose for which the right is sought to be exercised is a public use: *South Chicago R. R. Co. v. Dix*, 109 Ill. 243; *Berrien Springs etc. Co. v. Berrien* (Mich.), 94 N. W. 379.

c. **Decreased Cost by Exercise of Eminent Domain as Constituting a Public Use or Necessity.**—In *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, the petitioner sought to condemn a certain tract of land near the mouth of a river for boom purposes; the respondent, however, claimed that there were other places which offered abundant and ample facilities for boom works. The court in discussing this contention said: "It is further contended by the respondent that the petitioner has not in this instance shown any necessity for the taking of the particular lands which it seeks to appropriate, as it appears that there is other land available, although perhaps not so convenient for its purposes, and it is argued that the mere matter of convenience cannot be considered. It is true that the petitioner cannot condemn this property in the absence of any necessity therefor. But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route [here another location] considered in connection with the relative cost to one, and probable injury to the other'"; citing *Mobile etc. R. Co. v. Alabama etc. Ry. Co.*, 87 Ala. 508, 6 South. 406. On the point as to the "necessity" for the exercise of the right of eminent domain in the particular case, it was said in *Butte etc. Ry. Co. v.*

Montana etc. Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298, "that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite and proper for the establishment of the end in view, under the particular circumstances of the case." And in *Postal Tel. etc. Co. v. Oregon etc. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, it was said, under somewhat similar circumstances, that: "It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work."

V. Who Determines What is a Public Use.

Decisions may be found asserting that what is a public use is a legislative question and other decisions declaring with equal emphasis that this is a judicial question. But where there is a constitutional provision denying the right to take lands for any other than a public use, it would seem that the question whether any particular use is a public use or not is, ultimately at least, a judicial question: See monographic notes to *Lynch v. Forbes*, 42 Am. St. Rep. 406; *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 932. In this see, also, *In re Madera Irr. Dist.*, 92 Cal. 298, 27 Am. St. Rep. 106, 28 Pac. 274, 14 L. R. A. 755; *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Rockingham etc. Power Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46; *Bridal Veil etc. Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790, 34 L. R. A. 368; *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; *Highland Boy etc. Co. v. Strickley (Utah)*, 78 Pac. 296; *Stearns v. City of Barre*, 73 Vt. 281, 87 Am. St. Rep. 721, 50 Atl. 1086; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 904, 74 Pac. 681; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L. R. A. 662. But the necessity or expediency of appropriating property or authorizing its appropriation when the use is public is a legislative and not a judicial question: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, and note. See, also, note to *Beckman v. Saratoga etc. R. Co.*, 22 Am. Dec. 686; *Postal Tel. etc. Co. v. Oregon etc. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735. In *Grande Ronde Electrical Co. v. Drake (Or.)*, 78 Pac. 1031, it was held that the question whether or not a proposed use is in fact public or private is to be determined by the courts, independently of the objects expressed in the charter of the corporation claiming to be the recipient of the authority or of the statute purporting to confer it.

VI. Particular Uses for Which Right of Eminent Domain cannot be Exercised.**a. Means of Transportation.****1. Railroads.**

A. In General.—Although it is settled beyond controversy that railroads for public travel are public improvements in behalf of which the power of eminent domain may be properly exercised (see monographic note to *Beekman v. Saratoga etc. R. Co.*, 22 Am. Dec. 695), still the question now and then is raised whether "lateral railroads," which connect mines or other private property with public lines of railway or navigable water, are of such a nature as to constitute a public use. The same objections are also at times raised in regard to branch and spur railroads on the ground that they are built for purely private purposes. We will discuss those cases in subsequent sections. Canals have also been uniformly held to be public improvements: See cases collected in note to *Beekman v. Saratoga etc. R. Co.*, 22 Am. Dec. 697. A state dam, constructed for the purpose of making slack water navigation was held a legitimate public use in *Harris v. Thompson*, 9 Barb. 350. Booms constructed for the purpose of floating logs in navigable streams have been held a public use: *Cotton v. Mississippi Boom Co.*, 22 Minn. 372; *Lancaster v. Kennebec etc. Co.*, 2 Me. 272; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. But the application of water power to generate electricity for use as the motive power of a railway has been held not a public use: *Avery v. Vermont Electric Co.*, 75 Vt. 240, 98 Am. St. Rep. 818, 54 Atl. 179.

B. Necessity for Carriage of Both Freight and Passengers.—In the *Matter of Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429, a railroad company which was organized under the general law for the "operation of a railroad for public use in transporting persons and property" sought to condemn certain land alongside of Niagara Falls down to the point commonly called the "Whirlpool," a distance of about three miles. The starting point of the proposed route was on lands owned by the state and the terminus upon private lands, not connecting at either end with a highway. The road could be reached only by passing over lands of the state or lands of private owners. There was no likelihood of habitations along the line of the road, and no traffic or commerce or business except in conveying passengers to see the river and the "Whirlpool," and returning them again to the point from which they started. The season for visitors was limited to the summer months and the operation of the road was impracticable during the winter months on account of the piling of ice. The court held that under these circumstances the proposed road was not a highway in any just or proper sense, and that it could not perform one part of the duty it had undertaken—viz., the transportation of freight and that under all the circumstances its objects did

not constitute such a public use as would authorize the exercise of the right of eminent domain. So, also, in *Re Split Rock Cable Road Co.*, 128 N. Y. 408, 28 N. E. 506, an elevated tramway, which was about three and one-half miles long, had one terminus upon lands of a manufacturing corporation and the other on lands of its own, near the manufactory aforesaid. The incorporators were stockholders in the manufacturing corporation and the tramway had been used exclusively as an instrumentality to facilitate the business of the manufacturing corporation. It sought to condemn lands to increase its terminal facilities, but there was no highway leading to the terminus. It offered to carry freight for anyone to the extent of its surplus capacity after supplying the transportation needs of the manufacturing corporation. The tramway company used buckets sliding on cables as its means of conveyance, and it did not appear whether it would have any surplus capacity which would be at the service of the public. The court held that the intended use of the lands sought to be condemned was not for a public use. In *Memphis Freight Co. v. Memphis*, 44 Tenn. (4 Cold.) 419, it was held that the business "of loading and unloading freight, goods, wares and merchandise, cotton or other articles on or from boats or other water craft that may touch at the port of Memphis," and the erection of sheds, railroads and other necessary equipment for the prosecution of such business of hauling freight, was not a public use.

In *People v. Pittsburgh R. R. Co.*, 53 Cal. 694, a corporation was created for the construction of a railroad from a coal mine to a navigable river. Proceedings were had for the condemnation of the land necessary for the railroad. The company, however, failed to provide any cars for the transportation of passengers and no freight-cars except those designed for carrying coal. The court held that the use was a mere private use and that the condemnation proceedings had been procured under fraudulent pretenses, and that the franchise might be annulled at the suit of the attorney general. As having a bearing on this subject, see *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790, 34 L. R. A. 368. In the latter case it appears that the railroad was not fully completed at the time of the proceedings for condemnation of additional right of way. The road was built through a sparsely settled country and was not equipped with coaches, though it allowed anyone to ride on the rolling stock which it had in operation. Its business consisted mostly in the transportation of logs. The court held it to be a public use, though intimating that if it were constructed "for the evident purpose of transporting logs to its mill" that its ruling might be different.

C. Use of Branch Lines and Spur Tracks.—In *Chicago etc. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49, the railroad company sought to condemn land for a spur track to a large brickyard between one-

half and three-quarters of a mile distant. The use intended was added volume of business accruing from the hauling of the bricks over the spur and main line. It seems, however, that the charter of the main line made no provisions for the building of lateral branch roads, but designated the terminal points of the line. The court, in stating its reasons for denying the exercise of the right of eminent domain, said: "The fact that the building of lateral branch roads may add to the earnings of the main line, or increase its business, will not authorize appellant to build the same under its charter and condemn lands therefor"; citing *South Chicago R. Co. v. Dix*, 109 Ill. 237; *Currier v. Massetta etc. R. Co.*, 11 Ohio, 228; *Young v. McKenzie*, 3 Ga. 44; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Buffalo etc. R. Co. v. Brainard*, 9 N. Y. 108.

In *Railroad Co. v. Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. E. A. 680, the court said: "Stripped of all the disguises thrown around the case of petitioner, it plainly appears that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch road or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, 'of transporting freights to and from said steel works over the petitioner's said road.' This clearly was for the private accommodation of both the railroad and steel works, and to make the private business of both more profitable. This was not for a public, but was for a private use, and the taking of the property under those circumstances would be the taking of private property for private use, which is clearly prohibited."

In *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615, the existence of the railroad corporation was limited to ten years. The purpose of the railroad was the transportation of tan bark, owned by the controlling stockholder, to his tanneries about twelve miles distant. Although the promoters professed that the road was to be constructed for public use they failed to show any necessity for the road or that any public traffic would be obtained when it was constructed. The court held that the company was not entitled to exercise the right of eminent domain. The right to exercise the power of eminent domain was also denied in *Appeal of Edgewood R. Co.*, 79 Pa. St. 257, where the primary object of the road was the construction of a railroad from a coal mine owned by the stockholders to another railroad. It appears, however, that the Pennsylvania statutes had provided for the construction of lateral railroads, but the petitioner had not complied with those statutes nor had it complied with the general railroad law.

The weight of authority, however, seems to be opposite to the cases cited above, though it may be that the cases may be distinguishable.

In *Clarke v. Blackmar*, 47 N. Y. 150, it was held that a branch railroad to a grain elevator was held a public use. In *Toledo etc. R. Co.*

v. East Saginaw etc. R. Co., 72 Mich. 206, 40 N. W. 436, it was held that a branch line or extension to handle the freight from a large number of mills, salt works, and lumber-yards was a public use. In Chicago etc. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75, a switch track was held a public use, although a certain manufacturing establishment would be benefited by it more than anyone else of the public because it would have more freight to ship upon it. It was shown that this manufacturing establishment would not have any control or management of the track, and that all other persons having weight along or near it would also have the right to ship freight.

In Chicago etc. R. Co. v. Morehouse, 112 Wis. 1, 88 Am. St. Rep. 918, 87 N. W. 849, the authorities were exhaustively reviewed. The court in holding that a spur track to a large ice plant situated at a lake about a mile distant was a public use, adverted to the fact that the spur was built at the request of one of the ice plants which had large quantities of ice to ship, but remarked also, that the other ice plants in the vicinity had also the right to ship ice over the road. In the recent case of Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, a branch line of road to a lime quarry was upheld as a public use. The authorities were reviewed and the court announced that if the track was open to the public on equal terms, so that all can be served without discrimination, the branch track is for a public purpose: See, also, Farnsworth v. Lime Rock R. Co., 83 Me. 440, 22 Atl. 373, to the same effect. Lines of railway to mines are generally sustained as constituting a public use: Morrison v. Thistle Coal Co., 119 Iowa, 705, 94 N. W. 507; New York Min. Co. v. Midland Min. Co. (Md.), 58 Atl. 217; Butte etc. Ry. Co. v. Montana etc. R. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298; Harvey v. Lloyd, 3 Pa. St. 331; Appeal of Waddell, 84 Pa. St. 90; Ex parte Bacot, 36 S. C. 125, 15 S. E. 204, 16 L. R. A. 586.

D. Uses Incidental to Operation or Economical Management.—In Scranton Gas etc. Co. v. Northern Coal etc. Co., 192 Pa. St. 80, 73 Am. St. Rep. 798, 43 Atl. 470, it was held that a railroad would not be permitted to condemn for an additional track a portion of the land of a gas company necessary for the latter's present and future use, where such taking is merely for the convenience and economy of the railroad company. In Appeal of Sharon Ry. Co., 122 Pa. St. 533, 9 Am. St. Rep. 133, 17 Atl. 234, it was stated that to justify the taking by one railroad company for the same use, under the right of eminent domain, of land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, there must be a necessity so absolute that, without it, the grant itself would be defeated, and not a necessity created by the company itself for its own convenience, or for the sake of economy. In Louisville etc. R. Co. v. Hart County, 20 Ky. Law Rep. 1820, 50 S. W. 60, it was held that a railroad cannot exercise the

right of eminent domain by obstructing or appropriating a highway except on condition that it furnishes another road substantially as good as the old one for the public. In *New York etc. Co. v. Gunnison*, 1 Hun, 496, a railroad company was not allowed to condemn land outside of its right of way to obtain gravel to be used in ballasting its road. In *Eldridge v. Smith*, 34 Vt. 484, it was held that a railroad company could not, under the power of eminent domain, condemn land for a car factory, nor land for the erection of houses to be rented to their employes, though it was intimated that land for repair-shops could be condemned. It seems to be generally held that land for car repair-shops may be condemned: *Chicago etc. R. Co. v. Wilson*, 17 Ill. 123; *Hannibal etc. R. Co. v. Muder*, 49 Mo. 165. In *Low v. Galena etc. R. Co.*, 18 Ill. 324, land for a paint-shop, lumber and timber sheds for use of the company were allowed. In an early case in California it was said that the question whether workshops for repairing and safely keeping the cars and locomotives of a railroad company were necessary appendages was a question for the jury: *Southern Pacific R. Co. v. Raymond*, 53 Cal. 223.

It seems, however, that the condemnation of land for depots, stations, sidetracks and other accommodations for passenger or freight is generally allowed: *Protzman v. Indianapolis etc. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Dillon v. Kansas City etc. R. Co.*, 67 Kan. 687, 74 Pac. 251; *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; *Ft. Street etc. Co. v. Morton*, 83 Mich. 265, 47 N. W. 228; *Hannibal etc. R. Co. v. Muder*, 49 Mo. 165; *New York etc. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *In re New York Central etc. Co.*, 77 N. Y. 248; *In re Long Island R. Co.*, 143 N. Y. 67, 37 N. E. 636; *Giesy v. Cincinnati etc. Co.*, 4 Ohio St. 308; *Toledo etc. Co. v. Daniels*, 16 Ohio St. 390; *Cumberland etc. R. Co. v. McLanahan*, 59 Pa. St. 23; *Eldridge v. Smith*, 34 Vt. 484.

2. **Public or Private Roads or Ways.**—It does not seem to be disputed but that land for public highways may be condemned under the power of eminent domain. But when it is doubtful whether the road may be classed a public highway, the question is often raised whether the land can be condemned. The decisions on this question are by no means harmonious. In *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298, it was held that the character of a way, whether public or private, is determined under the law of eminent domain, by the extent of the right to use it, and not by the extent to which that right is used. In *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209, it was held that the laying out over private property of a road which was open to all who may desire to use it, is not a taking of property without due process of law, although the road accommodates but a single family. The same views were upheld in *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577; *Bankhead v.*

Brown, 25 Iowa, 540; Masters v. McHolland, 12 Kan. 17; People v. Kingman, 24 N. Y. 559; Ferris v. Bramble, 5 Ohio St. 109. Perhaps much of the diversity of opinion in regard to whether the right of eminent domain can be exercised in the laying out of what are termed "private roads" is caused by assuming that a road termed a "private road" is such in fact, though its use may in fact be public. In Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577, it was said that the term "private," when used in describing a road, is often used as indicating the manner of its establishment and maintenance rather than the manner of or mode of its use: See, also, Denham v. County Commissioners, 108 Mass. 205; Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, to the same effect. Those courts which hold that such roads are in fact what their name imports naturally hold that statutes which authorize the laying out of such roads over the lands of another person without his consent, are unconstitutional: See Sadler v. Langham, 34 Ala. 311; Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Crear v. Crossly, 40 Ill. 175; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Stewart v. Hartman, 46 Ind. 331; Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; Bankhead v. Brown, 25 Iowa, 540; Dickey v. Tennison, 27 Mo. 373; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287; Clack v. White, 2 Swan, 540; Rice v. Alley, 1 Sneed, 51; Varner v. Martin, 21 W. Va. 534; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161. Some of the decisions which support the constitutionality of such laws base their decision on the ground that the citizen must have a mode of egress in order to attend to such civic duties as attending court as jurors or witnesses; or performing the duty of voting at elections: Brewer v. Bowman, 9 Ga. 37; Robinson v. Scoope, 75 Ky. (12 Bush) 21; Cody v. Rider, 8 Ky. Law Rep. 52, 1 S. W. 2. Others support the constitutionality of such laws on the ground that such roads are part of the general road system, and private in name only, being in other respects public and open to the use of all who may need to use them: See In re Hickman, 4 Harr. (Del.) 580; Denham v. County Commissioners, 108 Mass. 202; Proctor v. Andover, 42 N. H. 348; Perrine v. Farr, 22 N. J. L. 356; Allen v. Stevens, 29 N. J. L. 509; In re Pocopson Road, 16 Pa. St. 15; Kilbuck Private Road, 77 Pa. St. 39; Waddel's Appeal, 84 Pa. St. 90; Singleton v. Commissioners, 2 Nott & McC. 526. In Richards v. Wolf, 82 Iowa, 358, 31 Am. St. Rep. 501, 47 N. W. 1044, it was held that a highway could not be run over the land of a person for the mere convenience of an adjoining owner. In that case the adjoining owner had another way of reaching the main highway: See, also, Ayres v. Richards, 38 Mich. 214; Bundell v. Blakeslee, 47 Mich. 575, 11 N. W. 392; Colville v. Judy, 73 Mo. 651; Barr v. Flynn, 20 Mo. App. 383; In re Private Road in Redston Township, 112 Pa. St. 183, 5 Atl. 383, to the general effect that private property cannot be taken for private roads in cases

where there is no necessity for such taking, and that it cannot be taken as a mere convenience. In *Shake v. Frazier*, 94 Ky. 143, 21 S. W. 583, it was held that where the owner does not reside on his land, a private way over land of another is not allowable, no matter how great a convenience such a way might be to such owner. But it would seem that a way of necessity is rather by way of an implied grant than by the exercise of the right of eminent domain: *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681. See the monographic notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318; *Wright v. Austin*, 101 Am. St. Rep. 102, on the general subject of highways and private ways. In *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559, 22 L. R. A. 496, it was held that the legislature had no power to authorize the taking of private property for purposes of a private road or way where the public interests would in no way be promoted. And in *Blackman v. Halves*, 72 Ind. 515, it was held that a highway which was not of public utility could not be maintained over the land of another. In *Underwood v. Bailey*, 59 N. H. 480, it was held that a highway accommodating only one person and not the public could not be compelled. In *Los Angeles Co. v. Reyes (Cal.)*, 32 Pac. 233, the court sustained the laying out of a private road as a public use. The court in making its decision, said: "The use is not a 'purely private use.' The principal use will doubtless be by Mr. Cheesebrough, but every one of the public at large who may have occasion to visit his place has the right to use the road. Besides, the state and all its inhabitants have an interest in having the products of his land brought to market, thus adding to the wealth of the state and the comforts of its inhabitants. Not that the state will do that for a man which he can do for himself; but where he is powerless to do that which is necessary to be done and which is essential to the use and enjoyment of his property for purposes in which the public have an interest, it is clearly in the power of the legislature to declare the use a public one. This question must be regarded as settled by the case of *Monterey County v. Cushing*, 83 Cal. 511, 23 Pac. 700, where the case of *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577, is approved": See, also, *Consolidated etc. Co. v. Central etc. Ry.*, 51 Cal. 269; *In re Madera Irr. Dist.*, 92 Cal. 309, 27 Am. St. Rep. 106, 28 Pac. 274, as bearing on the subject. In *Madera County v. Raymond Granite Co.*, 139 Cal. 123, 72 Pac. 915, it was again held that condemnation of land for private roads is not a taking of private property for private use, since a private road is in effect a public, and is called a private road merely for purposes of classification. In *New England Trout etc. Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569, the crossing of private lands to reach public waters for the purpose of taking fish therefrom was held a private use.

3. **Toll Roads and Bridges.**—Though the construction of toll roads has been held to constitute public uses (*Arnold v. Covington etc. Co.*,

62 Ky. 372; *In re Mt. Washington Road Co.*, 35 N. H. 134; *Benedict v. Goit*, 3 Barb. 459, as also toll bridges (*Young v. Buckingham*, 5 Ohio (5 Ham.), 485), still it has been held that a toll bridge company cannot exercise the power of eminent domain in securing ground for its abutments, approaches and tollhouses: *International Bridge etc. Co. v. McLane*, 8 Tex. Civ. 665, 28 S. W. 454.

b. Aids to Mining, Lumbering or Agricultural Pursuits.

1. *In General.*—In *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74, it was held that a tunnel in a mining claim could not be condemned as a right of way for the private use of another mine owner in working his mine. A somewhat similar ruling was made in *Salt Company v. Brown*, 7 W. Va. 191. In that case, a statute authorized subterranean or surface rights of way to mineral or timber land where they would be of public utility. The owners of a mine had thirty acres of coal land which could not be mined or transported without going through the land of the defendants by a subterranean right of way. The coal was to be used for manufacturing salt at the mine owner's furnaces, and some of it for sale at a certain market, but the people at that market were able to obtain coal from other sources. The court held that the purpose for which the right of way was to be used was not a public utility. In *West Virginia Transp. Co. v. Volcanic Oil etc. Co.*, 5 W. Va. 382, a right of way for a tube or pipe line for the transportation of petroleum was held a public use within the meaning of a statute authorizing the construction and maintenance of such lines. In *Healey Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, which was a proceeding to condemn certain land and waters for a logging road and waterway, it was held that a statute granting to the owner of timber lands the right to condemn a right of way over private property for logging roads and lumbering purposes was in violation of the constitutional provision prohibiting the taking of private property for a private use. In *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790, 34 L. R. A. 368, land was allowed to be condemned for a railroad, the main purpose of which was to transport logs to a sawmill. See discussion of the subject under the subdivision entitled "Railroads."

2. *Flumes or Waterways.*—In *Consolidated Channel Co. v. Central etc. B. Co.*, 51 Cal. 269, it was held that the legislature could not, in the exercise of the power of eminent domain, take private property for a purely private industry, such as to enable a person to build a bedrock flume to carry the dirt and gravel from his mining claims, or to obtain a place of deposit for the tailings and refuse matter from his claims. And in *Lorenz v. Jacob*, 63 Cal. 73, the condemnation of land for a ditch, the main and substantial object of which was to obtain water for the working of a certain mining

claim, was not allowed, although the owner of the proposed ditch also offered to sell or rent water to others for mining and agricultural purposes. This decision was discussed in *Ellinghouse v. Taylor*, 19 Mont. 464, 48 Pac. 756, wherein a contrary holding was had. The court, in its discussion of the case, adverted to the constitution of both states on the subject of water and water rights, and characterized the California decision as "narrow and retrogressive." In *Brewster v. J. J. Rogers Co.*, 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495, the defendant increased the flow of water in a river by discharging in it waters collected and stored by a dam. The increased volume of water injured plaintiff's dam, sawmill and farm. Defendant attempted to justify under a statute authorizing anyone who floats logs down a river to construct chutes, dams or make other changes in the river, provided that he be put upon a bond for compensation. But the court held the law, if treated as an act for the exercise of eminent domain, unconstitutional for several reasons, one of which was that the rights authorized to be acquired were not for the public use. In *Matter of Burns*, 155 N. Y. 23, 49 N. E. 246, the use by the public of a natural waterway to float logs from the interior of the northern part of New York state to the great lakes was held a public use. In *Maffet v. Quine*, 93 Fed. 347, the construction of a flume to convey lumber from mills to a city were held to be a work of such a public character as would authorize condemnation of a right of way therefor under the Oregon statute.

3. *Tramways.*—In *Sholl v. German Coal Co.*, 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199, it was held that a strip of land could not be condemned for the construction of a tramway from a coal mine to a public railroad. So, also, in *Leigh v. Garysburg Mfg. Co.*, 132 N. C. 167, 43 S. E. 632, it was held that a lumber company could not condemn land for a tramway to be used solely for the carrying of its own products. An elevated tramway, composed of cables over which were run buckets, which was used for carrying stone to a manufacturing plant, was held in *Matter of Split Rock Cable Road Co.*, 128 N. Y. 408, 28 N. E. 506, to be such a private use as prevented the exercise of the right of eminent domain. And in *Breaux v. Bienvenu*, 51 La. Ann. 687, 25 South. 321, it was held where a plantation borders on a public road and on a stream by means of which the products could be taken to market, though more inconveniently than by a tramway, a tramway cannot be constructed over adjoining land by expropriation proceedings under a statute allowing the construction of such tramways where land is inclosed and not fronting on a public road, railroad or watercourse.

c. Questions Affecting Water.

1. *In General.*—The deprivation of the rights of persons entitled to the use of water in a natural stream or pond seems to be recognized as a taking of private property within the meaning of the con-

stitutional provision regarding the taking of private property for private use: *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Aetna Mills v. Waltham*, 126 Mass. 422; *Cowdrey v. Woburn*, 136 Mass. 409; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393. In *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, 48 L. R. A. 707, the discharge of city sewage into a stream, which, in flood-time, carries the sewer filth out upon the pasture of a lower riparian proprietor, whereby the grass is rendered worthless, and noxious odors are emitted, to the annoyance and harm of such proprietor and his family, was held not such a taking of private property as must be preceded by just compensation, but a city's lawful authority to exercise the right of eminent domain in securing an outlet for its sewage into a stream does not permit it to seize upon the stream and its margins below the outlet to relieve consequential damages.

2. Irrigation Purposes.—The general rules in regard to the subject of irrigation were very well expressed in the leading case of *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369, which arose in the state of California. In that case the court said: "While the consideration that the work of irrigation must be abandoned if the use of water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact in this case is a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will, therefore, remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the land owners, or even to any one section of the state. The fact that the use of the water is limited to the land owner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even a considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All land owners in the district have the right to a proportionate share of the water, and no one land owner is favored above his fellow in his right to the use of the water. The water is not used for general domestic or drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the land owner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose." And in another portion of the opinion the court, with reference to whether the subject of irrigation would be deemed a public use in all parts of the country, said: "To provide for the irrigation of lands in states where there is no color of necessity therefor, within any fair meaning of the

term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power." The use of irrigation being more generally practiced in the western states, irrigation, as a subject matter of litigation, is more generally found in the decisions of the western states. The use of water for irrigation purposes has been recognized as a public use: *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755; *Rialte Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484; *Lake Koen etc. Irr. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371; *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635. In *Ellinghouse v. Taylor*, 19 Mont. 464, 48 Pac. 757, the court held that the use of water for the purpose of irrigating a particular tract of agricultural land, or working a particular mine was a public use, under the Montana constitution, as well as the use of water for irrigating a number of tracts of land, or working a number of mines owned by different persons.

3. Drainage Purposes.

A. Public Nature of Drainage Laws.—In *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 560, it was held that it was within the discretion of the California legislature to prescribe a system for reclaiming swamp lands, when essential to the health and prosperity of the community, and to lay the burden of doing it upon the districts and persons benefited. And in *Re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755, the court said: "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public; and particularly of that portion of the public within the district affected by the means adopted for such reclamation." So, also, in the very recent case of *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933, Justice Lorigan, in sustaining the public character of the use of land for drainage purposes, said: "It is to the interest of every

state, and hence conducive to the public good that all its lands should be utilized and made productive, and this end attained in any particular locality or localities is a benefit to the entire state." And continuing, he said: "And not only is drainage legislation supported as being, from a material point of view, conducive to the public good, but it is equally sustained as being within the exercise of the police power of the state—in the interest of public health." In fact, in some of the states drainage laws are upheld upon the ground of being an exercise of the police power: *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Winslow v. Winslow*, 95 N. C. 24; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545; *State v. McNay*, 90 Wis. 104, 62 N. W. 917. The court, in *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094, in drawing the distinction when drainage was an exercise of eminent domain, and when an exercise of the police power, said: "Where the laws have for their object the reclamation of large tracts of wet and swamp lands for agricultural purposes, they are sustained under the right of eminent domain. The fact that large tracts of otherwise waste lands may be thus reclaimed and made suitable for agricultural purposes is deemed and held to constitute a public benefit. When the object is to drain such lands in the interest of the public health and welfare, such laws are sustained and upheld as a proper exercise of the police power"; citing *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. Rep. 1086, 29 L. ed. 229.

B. Necessity for Public Benefit to Result.—In *Re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288, a law authorizing the taking of property for ditches and drains when it shall be made to appear to the circuit court that such works "are necessary or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes," was held invalid because it failed to express that the work must be necessary or desirable to promote any public interest, convenience or welfare, or that the taking of the property should be for a public use. The necessity for such drains to be for the public interest was also stated in *Chaplin v. Wheatland Highway Commrs.*, 129 Ill. 651, 22 N. E. 484; *Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673; *Reeves v. Wood County Treasurer*, 8 Ohio St. 333.

C. Public Health as a Public Benefit.—The drainage of swamps, marshes, or other wet lands giving rise to malaria or other unhealthy results, is generally upheld as being either within the right of eminent domain or the police power, on the ground that such drainage conduces toward the public health: *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761; *Coolman v. Fleming*, 82 Ind. 117; *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 613; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672; *In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *People v. Henion*, 64 Hun, 471, 19 N. Y. Supp. 483.

D. Effect of Private Benefit on Public Use.—The right of way for a drainage ditch cannot be taken where the ditch is solely for private benefit: *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 573; *Duke v. O'Bryen*, 100 Ky. 710, 39 S. W. 444, 824; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54. But it is not necessary in order that a drain may be regarded as of a public use, that the whole community or any large portion of it participate in its use. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character: *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191; *Heffner v. Cass and Morgan Counties*, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; *Talbot v. Hudson*, 16 Gray, 423. But in *McQuillen v. Hatton*, 42 Ohio St. 202, it was held that the fact that a proposed ditch by draining a farm would thereby enable the owners to raise more corn or better crops was not sufficient to make said ditch constitute a public use. The same ruling was also made in *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

E. Public Use as Dependent upon Area Drained.—Inasmuch as the community is benefited by anything that makes considerable bodies of land arable and adds to their taxable value, or that lessens disease, the drainage of any considerable body of wet lands is held to be a matter of public utility and benefit. The authority to construct drains for such lands is often referred to the police power of the state: *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782. We have, however, seen in a previous section that some courts sustain drainage legislation on the ground of its being an exercise of eminent domain. In *Talbot v. Hudson*, 16 Gray, 424, the court took judicial notice of the geographical features of certain rivers, and that under certain conditions large tracts of agricultural land would be overflowed and rendered unfit for agricultural purposes. The court held that the improvement of the agricultural capacity of an extensive district was a matter of public interest sufficient to form the basis for the exercise of the right of eminent domain. In that case, the reclamation of the land in question was affected by the removal of a dam allowing a better flow of certain rivers, instead of the construction of drains, ditches or canals. So, also, in *State v. Board of Commrs.*, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161, the court took judicial notice that certain counties of the state were wet and swampy during a greater portion of the year and were thus unfitted for agricultural or other purposes. The court held that the reclamation of these lands by a system of drainage will inure to the public good, not only by rendering them suitable for agricultural purposes, but also by naturally benefiting the public health. The court upheld the drainage law in controversy, but the opinion does not clearly show whether it was on the ground of eminent domain or the police power. In *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787, the facts were somewhat similar to the last case cited, but the court

appeared to base its ruling on the ground of eminent domain. So, also, in *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779, the court held that the drainage of land otherwise useless for agricultural purposes was a public use. In *Re Drain on Pequest River*, 39 N. J. L. 433, it was held that the legislature could employ the rights of eminent domain and of taxation in the formation of drainage legislation, but it also held that the beneficial results must not be mere speculative benefits. In *Ellinghouse v. Taylor*, 19 Mont. 463, 48 Pac. 757, the court, in its discussion of an irrigation ditch, seemed to consider that the same rules would be applicable to the reclamation of swamp lands. The court in that case held that the same principle of law applied to the reclamation by artificial irrigation of one hundred and sixty acres of agricultural land owned by one or two as to the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state. In *Pool v. Trexler*, 76 N. C. 297, the court, though upholding a drainage act on the theory of a police regulation, said: "If the general assembly has power to make regulations for draining a swamp containing ten thousand acres it has the same power in regard to a swamp containing one thousand acres. So of one hundred acres; so of one acre. There is no distinction in the principle; the only difference is in regard to the degree." In *Laguna Drainage District v. Charles Martin Company*, 144 Cal. 218, 77 Pac. 933, the court, in construing a drainage act, held that it was no objection that the area of the overflowed land in the drainage district amounts to a fraction less than one hundred and sixty acres. The extent of the area of the land overflowed cannot affect the question of public use in providing for its drainage; and the legislature has power to provide for drainage districts without reference to the extent of the flooded area.

4. **Matters Affecting Navigation.**—It does not seem to be questioned that land for piers, wharves, ferry landings or other similar shipping accommodations may be taken under the exercise of eminent domain: In *re Mayor of New York*, 135 N. Y. 253, 31 Am. St. Rep. 825, 31 N. E. 1043; *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872. In *Berrien Springs etc. Co. v. Berrien* (Mich.), 94 N. W. 379, the court, considering whether a certain dam was a public necessity, said: "It cannot be said, nor is it true, that because the taking results in improving the navigability of a stream, its public necessity is thereby proved. Under the constitution of Michigan, article 18, section 2, the necessity for the taking, as well as the compensation for the property, must be determined by a jury, or by commissioners appointed by a court of record. This constitutional tribunal and not the legislature must determine whether public necessity require this improvement in the navigability of St. Joseph river: *Powers' Appeal*, 29 Mich. 510. It cannot be said, as a matter of law, that public necessity requires improvements to be made in a navigable river, any

more than it can be said, as a matter of law, that public necessity requires a railroad to be built: See *Mansfield etc. R. R. Co. v. Clark*, 23 Mich. 524."

5. **Creation of Dams and Water Powers.**—The decisions in regard to whether the creation of dams and water powers constitutes a public use are not uniform. The older decisions and the principles upon which the creation of such dams are sustained were very fully stated by Chief Justice Cooley, in *Eyerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, wherein he, in reviewing the subject exhaustively, came to the conclusion that the development of water power by such dams was not generally a matter of such general advantage as to constitute a public use. In one part of his opinion he said: "Statutes permitting lands to be thus taken for the purposes of water power have been passed in some other states, and have been enforced. In Massachusetts, they have received considerable attention, and have been sustained largely in reliance upon a general state policy evidenced by a long series of legislative enactments: See *Wolcott Woolen Mfg. Co. v. Upham*, 5 Pick. 294; *Boston etc. Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Hazen v. Essex Co.*, 12 Cush. 477. In Maine, the like considerations have supported them: *Jordan v. Woodward*, 40 Me. 317. In New Hampshire, the whole subject was very carefully considered in the case of *Great Falls Mfg. Co. v. Fernold*, 47 N. H. 444, and the taking of land for mill dam purposes was justified on the ground that statutes existed for the purpose when the constitution was adopted, and it was reasonable to construe that instrument as permitting them: See, also, *Ash v. Cummings*, 50 N. H. 591. In Tennessee, Indiana, Connecticut, and Kansas, such statutes have been considered sustainable on principle: *Harding v. Goodlet*, 3 Yerg. 41, 24 Am. Dec. 546; *Hankins v. Lawrence*, 8 Blackf. 266; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, 8 Kan. 315. In Wisconsin, they have been sustained: *Newcomb v. Smith*, 1 Chand. 71; *Thien v. Voegtlander*, 3 Wis. 461; *Pratt v. Brown*, 3 Wis. 603; but it has since been declared that if the question were new and the court not embarrassed by previous decisions, a different conclusion would doubtless be reached: *Fisher v. Horicon etc. Co.*, 10 Wis. 351, 353. In Georgia, such statutes have been declared to be beyond the constitutional power of the legislature: *Loughbridge v. Harris*, 42 Ga. 500. An eminent judge in New York has expressed a like opinion: See *Hay v. Cohoes Co.*, 3 Barb. 47. A like view has been taken in Alabama, though it was assumed in the case that mills which were to grind grain for toll and were required to serve the public impartially might be aided by such statutes: *Sadler v. Langham*, 34 Ala. 311. In *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398, it was held that the taking of lands for mill dams was not a taking for a public use, at least where the mills were not compelled by law to render service for the public under impartial regulations. An examination of the adjudged cases will show

that the courts, in looking about for the public use that was to be accommodated by the statute, have sometimes attached considerable importance to the fact that the general improvement of millsites, as property possessing great value if improved, and often nearly worthless if not improved, would largely conduce to the prosperity of the state. This is especially true of the decisions of those states where water power is most abundant, and where, partly because of a somewhat sterile soil, manufactures have attracted a larger proportion than in other states of the capital, skill and labor of the community. In this state, it is doubtful if such legislation would add at all to the aggregate of property. Numerous fine millsites in the populous counties of the state still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe a dam would become a nuisance; and in such cases no permission to take lands and no condemnation for mill purposes could protect the parties maintaining a dam against prosecution for the public grievance." And in *Berrien Springs etc. Co. v. Berrien* (Mich.), 94 N. W. 379, the use of a water power to be created by a proposed dam, for mining, manufacturing, domestic, municipal, agricultural and navigation purposes, together with the furnishing to the people in the vicinity with electricity, was held to be a private use which would not authorize condemnation. In *Kaukauna Water Power Co. v. Green Bay etc. Canal Co.*, 142 U. S. 254, 12 Sup. Ct. Rep. 173, 35 L. ed. 1004, a case which arose in Wisconsin, the court said: "The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement." In *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726, it was held that a tailrace was not a thing for which land could be condemned. And in *Moore v. Wright*, 34 Ala. 311, a mill dam was held not a public use. In Vermont, the statute allows the right of eminent domain to be exercised by every riparian owner for the maintenance of a mill or manufactory of public benefit. The court, in *Avery v. Vermont Electric Co.*, 75 Vt. 235,

98 Am. St. Rep. 818, 54 Atl. 179, in construing this statute, held that the raising of a dam higher in order to generate electricity to operate a railroad was not such a public use, because the owner of the dam was under no obligation to serve the railroad or to give advantages to all. The court, also in its argument, approved the case of *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398, previously adverted to. On the other hand, as tending to sustain the flowage of land for the purposes of creating a dam, see *Burnham v. Thompson*, 35 Iowa, 421; *Todd v. Austin*, 34 Conn. 78; *Boston etc. Mill Dam Corporation v. Newman*, 12 Pick. 467, 23 Am. Rep. 622; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; *Jordan v. Woodward*, 40 Me. 317; *Jones v. Skinner*, 61 Me. 25; *Miller v. Troost*, 14 Minn. 365 (Gil. 282); *Waddy v. Johnson*, 5 Ired. 333.

d. **Mills or Other Public Enterprises.**—In most of the decisions adverted to in the above section, the question whether the mill constituted such a public use as warranted the exercise of the power of eminent domain in obtaining land for a site for it was incidentally discussed. The subject does not seem to arise very frequently among the more modern decisions. In *Gaylord v. Sanitary District*, 204 Ill. 576, 98 Am. St. Rep. 285, 68 N. E. 522, which seems to be the most modern construction of the "gristmill" statutes, which formed the basis for the earlier decisions, the court held that the condemnation of private property for the purpose of public mills or machinery other than public gristmills was a violation of the constitutional provision forbidding the taking of private property for public use without compensation. The same conclusion was reached in *Harding v. Goodlett*, 11 Tenn. (3 Yerg.) 41, 24 Am. Dec. 546. And in *Loughbridge v. Harris*, 42 Ga. 500, it was held that a mill, though intended to be used by the public, is not a public institution justifying the appropriation of private property. In *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398, it was held that gristmills are not public mills where they are not compelled to receive grain for grinding against their will, even though it was required to grind at fixed rates of toll. But in *Getchell v. Benton*, 30 Neb. 870, 47 N. W. 468, a gristmill which grinds for toll was held to be a public mill. In *Hankins v. Lawrence*, 8 Blackf. 266, it was said that gristmills, oilmills, carding machines and woolen factories were of such public use that land for a site could be taken. In this connection, see the extended note to *Beekman v. Saratoga etc. R. Co.*, 22 Am. Dec. 686.

e. **Public Appropriation of Ground for Scenic Purposes.**—The taking of lands by inclosing them within harbor lines for the sole purpose of preventing the erection of buildings thereon, which would obstruct and mar the view of a public bridge is not a proper exercise of the right of eminent domain: *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. But in *United States v. Get-*

tysburg Electric Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427, 40 L. ed. 576, it was held that the preservation and marking on the site of the battle of Gettysburg of the positions occupied by the different military organizations at that battle was a public use or purpose. The laying out of public parks and squares are held to be for public uses: See *Rowan's Exr. v. Portland*, 47 Ky. (8 B. Mon.) 232; *St. Louis County Court v. Griswold*, 58 Mo. 175; *In re Central Park Commrs.*, 63 Barb. 282; *In re Rochester*, 137 N. Y. 243, 33 N. E. 320; *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689; affirmed in 176 U. S. 335, 20 Sup. Ct. Rep. 460, 44 L. ed. 492; *Laird v. Pittsburg*, 205 Pa. St. 1, 54 Atl. 324, 61 L. E. A. 332; *Shoemaker v. United States*, 147 U. S. 282, 18 Sup. Ct. Rep. 361, 37 L. ed. 170.

BIG STONE GAP IRON COMPANY v. KETRON.

[102 Va. 23, 45 S. E. 740.]

MASTER AND SERVANT—Assumption of Risks.—A person who voluntarily enters the service of another assumes all the open and obvious risks usually incident to such employment, and is presumed to have contracted with respect thereto. (p. 840.)

MASTER AND SERVANT—Employment of Surgeon.—If the master assumes to employ a surgeon to treat his servants, he must exercise reasonable care in his selection, but the presumption is that this duty has been performed. (p. 840.)

MASTER AND SERVANT—Employment of Surgeon.—In order to hold a master liable for the incompetency of a surgeon selected by him to treat his employes, the incompetency of the surgeon must be proved, and there must be evidence of a want of reasonable care on the part of the master in his selection, or actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice had he exercised due oversight and supervision. (p. 842.)

Bullitt & Kelly, Curtin & Shelton and R. T. Irvine, for the plaintiff in error.

J. C. Noel and C. C. Bales, for the defendant in error.

²⁵ **KEITH, P.** Defendant in error sued in the circuit court of Lee county to recover damages for an injury received by him while in the service of plaintiff in error. His declaration contains two counts. The first count charges that the company was negligent in failing to provide proper support for the roof of a certain iron mine, by reason of which it fell upon the plaintiff, breaking his leg, and doing him other bodily injury. The second count is to recover for the alleged malpractice of

the surgeon who attended the plaintiff, after he received the injuries detailed in the first count. At the trial the defendant demurred to the evidence, and the jury rendered a verdict for the plaintiff for the sum of three thousand dollars, upon which the court entered judgment for the plaintiff, and the defendant obtained a writ of error from one of the judges of this court.

With respect to the evidence upon the first count, it is sufficient to say that the law is well settled that where a person voluntarily enters the service of another he assumes all the risk usually incident to such employment, and is presumed to have contracted with respect thereto. That the risk in this case was of this character, and that it was open and obvious, appears from the testimony of defendant in error.

The second count presents a question of more interest. The plaintiff's leg was broken in three places—at a point just above the knee, about half way between the knee and the hip, and near the hip joint. He was attended by Dr. Clyde Johnson, who was in the service of the defendant company, which retained out of the wages of each married employé the sum of one dollar per month, and out of the wages of each unmarried employé the sum of fifty cents per month, to pay for medical and surgical attention to the employés and their families. Dr. Johnson set the plaintiff's leg, dressed it, and put it into a plaster cast, elevated it, attached a pulley and weight to it, and then left the injured man in that condition for several days without surgical attention. Dr. Fulkerson was then called in, and it was ascertained that the bandages had loosened, that the fracture at the middle of the left thigh had not knit together properly, and that the leg at that point had twisted and was considerably shorter than the other leg. Dr. Spencer was introduced as an expert, and he testifies that the injury in this case was not treated according to the more recent methods; that the proper practice is to bandage the leg and put plaster of paris upon the bandages until it forms a cast for the limb. The injury in this case he described as a compound comminuted fracture, and the fault consisted in not keeping the leg straight until the bone knit, and that the twist in the leg could have been avoided by skillful treatment. The clerk of Lee county was introduced by plaintiff to show that Dr. Johnson was not registered as a physician in his office, as required by law, the object of the evidence being to show that the company had not used proper care in the selection of a surgeon. We shall not consider the correctness of this ruling further than to say that

the evidence was immaterial, and ought not to have been admitted; but we do not think it of sufficient importance, standing alone, to warrant a reversal of the case. We shall, therefore, consider this assignment of error, uninfluenced by that evidence.

It appears that each married employé was required, as we have said, to pay one dollar a month out of his wages, and each unmarried employé the sum of fifty cents a month out of his wages to pay for the services of a physician or surgeon to attend them and their families, as their needs required. There is no evidence that the company derived, or expected, any advantage or profit from the fund so created. In the selection of a surgeon it was the duty of the company to exercise reasonable care, and the presumption is that this duty was performed, in the absence of evidence to the contrary. There is no evidence in ²⁷ the record with respect to the fitness of Dr. Johnson, except the testimony with respect to his treatment of the injury sustained by the defendant in error.

To hold the company liable for the incapacity of the surgeon, it was necessary to aver and prove (1) that it was guilty of negligence in selecting an unfit surgeon, or (2) if reasonable care was exercised in the selection of a surgeon who afterward proved to be incompetent, notice of his incompetency by reason of his inherent unfitness, or by previous specific acts of negligence, from which incompetency might be inferred; or (3) either actual notice to the master of such unfitness or bad habits, or constructive notice by showing that the master could have known the facts, had he used ordinary care in oversight and supervision, or by proving general reputation of the surgeon for incompetency or negligence; and (4) that the injury complained of resulted from the incompetency proved. "The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. . . . Evidence of only one other negligent act of the servant in fault is not usually sufficient": *Shearman and Redfield on Negligence*, sec. 192; *Meyers v. Falk*, 99 Va. 385, 38 S. E. 178.

"If," said the court, in *Secord v. St. Paul etc. Ry. Co.*, 18 Fed. 221, "the railroad assumes the responsibility of engaging a surgeon, and placing him in charge of parties that may be injured, and sending him to their aid, so that these parties may place themselves under the care of this physician or surgeon, then it is responsible thus far: that the person it selects must be a competent man. He must be reasonably fitted for

the duties which he is called upon to perform. In other words, it will not do for the company to take up some incompetent man, who is not fit, by education or experience, to undertake the responsibilities of any case that may be placed in his hand. If it does engage a physician and surgeon who is ²⁸ sufficiently experienced, that is all that can be expected of the railroad company, and is all of its liability. . . .

"Now, he may be an ordinarily competent man, and yet in the attendance upon any particular case that he undertakes, he may be negligent. He may be negligent in that particular case, and neglect his duty therein, though he may generally be ordinarily competent. If that be true, and you so find the facts to be in this particular case, that when treating the plaintiff as a physician and surgeon, he was negligent in the performance of his duty—if you should find that from the evidence—then you must determine whether he was a competent man, and was a proper and responsible surgeon for the company to engage as such; and if you find that the company performed its duty in that regard, that is all that could be required of it."

In *Laubheim v. De Koninglyke etc. Steamboat Co.*, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781, it was held that in the absence of evidence of any carelessness or negligence on the part of a steamship company in the selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon; that in the performance of such duty it is responsible solely for its own neglect, and not for the negligence of the surgeon; that it is bound to use reasonable care and diligence in the selection of a person reasonably competent, but it is not compelled to select and employ the highest skill and longest experience.

It was the duty of the company, we repeat, to exercise reasonable care in the selection of a surgeon. The presumption is that it discharged this duty, and the burden of proving negligence in selecting or continuing an unfit servant is upon the plaintiff: *Shearman and Redfield on Negligence*, sec. 192.

To hold the company liable for the incompetency of the surgeon, there must be evidence of a want of reasonable care in his selection, or actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice ²⁹ had he exercised due oversight and supervision. The case stands here upon the presumption that the plaintiff in error exercised reasonable care in the selection of the surgeon, of whose negligence complaint is made. The record is silent as to

his fitness, except the facts detailed with reference to his treatment of the injuries sustained by the defendant in error, so that there was no notice, actual or constructive, to plaintiff in error of his incompetency for the performance of the duties for which he had been selected, for "the specific negligent act on which the action is founded may, in some cases, but not generally, be such as to prove incompetency, but never can, of itself, prove notice thereof to the master": *Shearman and Redfield on Negligence*, sec. 192.

We are of opinion that the court should have sustained the defendant's demurrer to the plaintiff's evidence, and it is therefore ordered that the judgment of the circuit court be reversed, and that a judgment be entered for the defendant, with costs.

As to Whether an Employer owes the duty to his employes of procuring them medical or surgical aid, see Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492, 60 Am. St. Rep. 172; Spelman v. Gold Coin Min. etc. Co., 26 Mont. 76, 91 Am. St. Rep. 402. And as to his liability, in case he does so, for the negligence or malpractice of the physician, see Pittsburgh etc. R. R. Co. v. Sullivan, 141 Ind. 83, 50 Am. St. Rep. 313; Quinn v. Railroad, 94 Tenn. 713, 45 Am. St. Rep. 767.

HEADRICK v. McDOWELL.

[102 Va. 124, 45 S. E. 804.]

ADVANCEMENTS—Release of Expectancy.—If heirs have received equal advancements from their father they are entitled to share equally in such property as he thereafter accumulates, and of which he dies intestate, although some of such heirs have executed releases of all further interest in the estate. (p. 845.)

ADVANCEMENTS—Intestate Estate.—If an advancement has been made to an heir in the lifetime of the parent, who dies intestate, it must be brought into hotchpot by him who receives it, with the result that perfect equality may be attained between the heirs, with respect to the estate of the intestate. (p. 845.)

J. L. Tredway and S. A. Anderson, for the appellant.

P. H. and H. Dillard, for the appellees.

¹²⁶ **KEITH, P.** Jacob Headrick, wishing to make an advancement to his son, John C. Headrick, of the whole of that portion of his estate, both real and personal, which he supposed his son would otherwise receive upon the father's death, on the 31st of August, 1883, paid to his son, John C. Headrick, the

sum of eight hundred and fifty dollars, and in consideration thereof John C. Headrick forever relinquished all interest in and claim to any portion of the estate which Jacob Headrick then owned or might thereafter acquire, and as to which he might die intestate. This advancement on the part of the father and relinquishment on the part of the son is evidenced by writing under seal, filed with the record. On the twentieth day of June, 1885, the father made advancement of certain real and personal property to his daughter, Mary Jane McDowell, in consideration of which she relinquished her interest in and claim to any portion of the estate then owned by her father, or which he might thereafter acquire, and as to which he might die intestate, which contract is also evidenced by a paper under seal, duly signed by father and daughter.

Jacob Headrick had a third child, William C., the issue of a second marriage, and to him, during his lifetime, he also made advances equal in value to those made to his two children above set out, but he did not exact from William any relinquishment of interest in the residue of his estate.

After these advances had been made, Jacob Headrick accumulated property valued at about two thousand dollars, and died intestate. Thereupon William C. Headrick filed his bill, setting out the facts with respect to the advancements to his half-brother and half-sister, and concludes with the prayer that the property, real and personal, of which his father died seised and possessed, might be decreed to him, and that Mary J. McDowell and ¹²⁶ John C. Headrick be excluded from any participation in the father's estate by virtue of their deeds of relinquishment.

The circuit court was of opinion that all the estate of which Jacob Headrick died seised and possessed "descends by operation of law to Mary J. McDowell, John C. Headrick and William C. Headrick, who are the children and heirs at law of said decedent, and are entitled to an equal participation in all of the personal and real estate of said Jacob B. Headrick, subject to the dower rights of L. F. Headrick, the widow of the said Jacob B. Headrick, he having died intestate," and to this decree an appeal was allowed by one of the judges of this court.

We are of opinion that there is no error in this decree.

The petition for appeal cites adjudications from courts of the highest respectability, which tend strongly to maintain petitioner's contention. In *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, it was held that a "release by heir apparent of his

estate in expectancy, with a covenant of nonclaim, made fairly, and with the consent of his ancestor, precludes the releasor from afterward setting up a claim to any part of his ancestor's estate, either as heir or as devisee." And in *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464, the court, citing *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, with approval, says: "A release with covenants of warranty by an heir apparent of his estate in expectancy will bar his claim by descent on the death of his ancestor." And in *Trull v. Eastman*, 3 Met. 121, 37 Am. Dec. 126, the court says: "Where an heir apparent conveys his estate in expectancy, and covenants in the deed that neither he nor those claiming under him will ever claim any right in such estate, this covenant, which amounts to a warranty, will bar him and those claiming under him when the right accrues." To the same effect is *Kenney v. Tucker*, 8 Mass. 143; *Nicholson v. Caress*, 59 Ind. 39; *Kershaw v. Kershaw*, 102 Ill. 127 307; *Simpson v. Simpson*, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287.

There is authority, also, upon the other side of the question. In *Cannon v. Nowell*, 51 N. C. 437—a case which involves the question here under consideration—Judge Ruffin uses the following language: "Heirs take by positive law when the ancestor dies intestate, and the course of descents cannot be altered by words excluding particular heirs or by any agreement of parties. Suppose the father to have had no other child at his death but the plaintiff. Being the sole heir, he must have taken the whole of the descended land *ex necessitate*. There must, therefore, be a disposition to another, so as to break the descent, otherwise the land descends according to law; that is, in this case, to the heirs in general, subject to the provision for bringing advancements into hotchpot": See, also, *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69, 8 S. E. 672, 2 L. R. A. 848; *Denson v. Autrey*, 21 Ala. 205.

We have no decision upon the subject in Virginia, and, notwithstanding the formidable array of authorities, we are disinclined to ingraft the principle which they maintain into our jurisprudence. Upon the death of the ancestor the descent is cast by operation of law upon the heirs, and the personalty passes in accordance with the statute of distribution. Where advancement has been made in the lifetime of the parent, it must be brought into hotchpot by him who receives it, with the result that perfect equality is attained with respect to estates of intestate decedents.

The question put by Judge Ruffin in *Cannon v. Nowell*, 51 N. C. 437, would be equally pertinent in the case before us: Where would the estate of Jacob Headrick have gone if W. C. Headrick had died without issue in the lifetime of his father? Our laws for the descent and distribution of the estates of intestate decedents are simple, and produce perfect equality, while our statute upon the subject wisely regulates, without unduly restraining, the ¹²⁸ power of testamentary disposition, and we do not feel that the introduction of the principle for which appellant contends would promote the administration of justice, or be a desirable addition to our jurisprudence.

The decree of the circuit court is affirmed.

As Advanced Heir is not Entitled to Participate with his coheirs in the distribution of the estate, according to Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726, Sims v. Sims, 39 Ga. 108, 99 Am. Dec. 450, unless he brings his advancement into hotchpot with the whole estate, and takes his equal share thereof. See, also, Jackson v. Jackson, 28 Miss. 674, 64 Am. Dec. 114. But in Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, it is held that an advancement to a son, in full of all claims against the estate of the father, will not prevent his taking as heir a residuum not disposed of by will. In Rodemeier v. Brown, 169 Ill. 347, 61 Am. St. Rep. 176, it is held that a daughter who executes a receipt in full for money advanced by her father as her portion of his estate, is estopped to claim any further portion thereof.

VIRGINIA FIRE AND MARINE INSURANCE COMPANY v. RICHMOND MICA COMPANY.

[102 Va. 429, 46 S. E. 463.]

INSURANCE, FIRE—Waiver of Forfeiture.—Conditions in a policy of fire insurance which are for the benefit of the insurer, and the breach of which may operate a forfeiture, may be waived by the insurer, or his lawful agent. (p. 849.)

INSURANCE, FIRE—Waiver of Forfeiture by Agent.—If the general agent of an insurance company applies to an insured to renew his policy and is informed by the latter that he has contracted to sell the insured property, has put the purchaser in possession, and received part of the purchase price, giving a full statement as to the condition of the title and the ownership, and such agent, without written application, writes and delivers a new policy on the property, which he states is sufficient to meet the situation disclosed, and receives the premium, the insurer is estopped to set up a forfeiture of the policy by reason of conditions therein rendering it void if the interest of the insured be other than unconditional and sole ownership, unless otherwise provided by agreement indorsed on the policy,

and that no agent of the insurer can waive any condition of the policy except by written agreement indorsed thereon or annexed thereto. (p. 852.)

INSURANCE—Estoppel to Deny Acts of Agent.—An insurance company is estopped to say that an agent of its own selection has exceeded his powers, and has not communicated to it facts made known to him by the assured, and that he has no authority to waive conditions in a policy, notwithstanding an inhibition therein, unless it can be shown that special limitations upon the power of the agent are known to the assured, or plainly appear from the nature of the agent's employment. (p. 853.)

Leake & Carter, for the plaintiff in error.

Munford, Hunton, Williams & Anderson and L. C. Williams, for the defendant.

430 WHITTLE, J. This was a proceeding by motion in the circuit court of the city of Richmond by the defendant in error, the Richmond Mica Company, against the plaintiff in error, the Virginia Fire and Marine Insurance Company, upon a fire insurance policy, to recover the sum of fifteen hundred dollars, loss occasioned the plaintiff from the destruction by fire of certain of the property covered by the policy.

The policy contains, among others, the following provisions: "1. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple.

"2. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be indorsed hereon, or added hereto, and no officer, agent or other representative of 431 this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Plaintiff in error denies liability for the loss on the ground that at the date of the policy the interest of the assured in the property was other than the unconditional and sole ownership, and that the building destroyed was not located on ground owned

by the assured in fee simple, and that there had been no waiver of the forfeiture which accrued from the breach of the condition of the policy in the manner and upon the terms prescribed in the second provision, and the entire policy was, therefore, void and of no effect.

There was a demurrer to the evidence, which the trial court overruled, and rendered judgment for the plaintiff for the damages provisionally assessed by the jury, and the case is here on writ of error to that judgment.

It is conceded that, if the insurance company is liable at all, the amount of the recovery is correct; but, as remarked, the company denies liability in toto, for the reason stated.

It appeared in evidence that R. A. Lancaster, Jr., was the general agent of the insurance company for the city of Richmond; that during a series of years he had received the premiums and written insurance upon the property in question for the defendant in error in the company of his principal; that these policies were renewed from year to year, it being the practice of the agent before the expiration of a former policy to write insurance upon the property for the ensuing year, to deliver the policy to L. M. Williams, the secretary and treasurer 432 of the assured, and collect the premiums from him. There was no written application for any of this insurance, and no information with respect to the property was demanded of the assured. Lancaster solicited the risk, wrote the insurance, received the premiums, and, in fine, was alone known to the assured throughout the transaction.

In accordance with custom, in the latter part of the year 1902 Lancaster approached Williams for the purpose of renewing the insurance for the year 1903, when he was informed by Williams that the Richmond Mica Company had contracted, in writing, to sell the property to one Mersereau, and had placed him in possession of it; that Mersereau had paid part of the purchase price, but owed a balance on the property of three thousand four hundred and two dollars and forty-three cents, which, when paid, or secured to be paid, would entitle him to a conveyance. Having thus voluntarily made a full and fair disclosure of the state of the title of his principal, Williams requested Lancaster to write the insurance so as to meet the exigencies of the case. Whereupon Lancaster assured him that it was not necessary to alter the policy, as it had been prepared by him; that when the title to the property was transferred to Mersereau, it would be time enough to make the change. Act-

ing upon that information and assurance, the premium was paid, and the policy accepted as filled up by Lancaster.

The status quo of all parties was maintained until May 30, 1903, when the property was destroyed by fire. In its proof of loss, the assured having again called attention to its contract with Mersereau, the insurance company denied liability, and tendered the amount of the premium to Williams, who promptly declined to receive it.

On a similar state of facts, this court has so often decided that the conduct of the agent estops the insurance company from asserting the forfeiture relied on that it may be stated as established law in this jurisdiction.

In the case of Georgia Home Ins. Co. v. Kinnier, ⁴²³ 28 Gratt. 88, it was held that when a policy of insurance contained a condition that the policy should be vitiated if the premises became vacant by the removal of the owner or occupant for a period of more than twenty days without immediate notice to the company, and written consent, it was competent for the insurer or its lawful agent to waive this condition, and if, at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the company to defeat a recovery upon the policy. In the case of McLean v. Piedmont etc. Ins. Co., 29 Gratt. 372, the above case is cited as authority for the proposition that conditions in a policy which are for the benefit of the insurer, the breach of which may operate a forfeiture, may be waived by the insurer or his lawful agent. The rules there laid down with respect to the doctrine of waiver and estoppel in such cases are followed and approved in Manhattan Fire Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364; Lynchburg Ins. Co. v. West, 76 Va. 578, 44 Am. Rep. 177; Wytheville Ins. etc. Co. v. Teiger, 90 Va. 277, 18 S. E. 195; Easley v. Valley Mut. etc. Ins. Co., 91 Va. 169, 21 S. E. 235; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 N. E. 487; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Farmers' Assn. v. Williams, 95 Va. 248, 28 S. E. 214; Virginia Fire etc. Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366; Union Assur. Soc. v. Nalls, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896.

In many of those cases the policies were "standard policies," identical in form with the one under consideration.

In *Lynchburg Fire Ins. Co. v. West*, 76 Va. 578, 44 Am. Rep. 177, the court recognizes the general rule that parol testimony is inadmissible to vary or contradict written instruments, but holds that exceptions exist where the assured is misled by declarations of the insurer or his agent; where the insurer ⁴³⁴ insists on forfeitures of his own creation; where the insurer or his agent, in preparing an application or policy, fails to follow correct descriptions given by the assured; or where one uses his superior knowledge or influence to mislead the other as to the true import of the contract. Parol testimony is admissible in such instances, it is said, not to contradict the writing, but by way of equitable estoppel to prevent its use. It was also held in that case that the agent's knowledge of the real condition of the risk is imputable to the principal, and estops him from setting up any warranty inconsistent therewith.

Thus in *Virginia Fire etc. Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366, the court held that what passed between an agent and the assured while filling out an insurance policy is admissible when offered, not to contradict the policy, but to show that a representation therein ought not to operate as an estoppel upon the assured.

In *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209, the court says, at page 237, 95 Va., page 211, 28 S. E.: "That knowledge of a general agent, who has power to receive and accept proposals for risks, subject to the approval and ratification of his principal, to issue and deliver policies, and renew and cancel the same, will bind the company, was decided by this court in the case of *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 96. . . . That facts communicated to the agent exercising powers thus enumerated, though uncommunicated to his principal, were held in the case of *Lynchburg Fire Ins. Co. v. West*, 76 Va. 578, 44 Am. Rep. 177, to bind the company, there being no evidence to show that special limitations upon the power of the agent were known to the assured, or were plainly to be inferred by him from the nature of the agent's employment."

In *Farmers' etc. Assn. v. Williams*, 95 Va. 248, 28 S. E. 214, the following statement of the rule is quoted with approval from the opinion of Judge Cooley in the case of *Aetna Ins. Co. v. Olmstead*, 21 Mich. 253, 4 Am. Rep. 483: ⁴³⁵ "Where an agent, who, at the time and place, is the sole representative of the principal, assumes to know what information the prin-

cipal requires, and, after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

The following language from the leading case of *Lynchburg Fire Ins. Co. v. West*, 76 Va. 578, 44 Am. Rep. 177, which was also quoted with approval by this court in the case last named, is so apposite to the case in judgment that it may with propriety be repeated: "If the defendants were misled, it was by their own agent, and not by the plaintiff. The latter honestly gave the agent all the information that was required of him. He relied upon the agent to see that the business was correctly done, according to the requirements of the company. Called upon to make answers to certain interrogations, he had the right to presume that the agent was competent to understand their meaning and effect, as well as the meaning and effect of the provisions of the policy bearing upon the disclosures made. The defendants ought not now to be heard to say that the agent of their own selection had exceeded his powers, and that he had not communicated to them the facts made known to him by the plaintiff. This is manifestly so, unless it could be shown that special limitations upon the powers of the agent were known to the plaintiff, or plainly appeared from the nature of his employment.

"No such limitations upon the powers of the agent are brought home to the assured, either in the application or otherwise."

⁴³⁶ As has been seen, the assured gave full and explicit information with respect to its contract with Mersereau to Lancaster, the general agent of the insurance company, and invoked his superior knowledge, in the light of all the facts, to write a policy which would afford the indemnity sought, and to secure which the premium was paid. Under these circumstances, without the slightest suspicion of bad faith on the part of the assured, the policy in question was prepared and delivered by Lancaster, with the assurance that it met the necessities of the case; and

upon that assurance, the assured acted, and parted with the premium. Between the delivery of the policy and the fire, no change had taken place in the status of the property, and not a dollar more of the purchase price had been paid by Messereau; and it is conceded that the assured had an insurable interest in the property far greater in value than the amount of the policy. In the face of this undisputed testimony, to permit the insurance company, after loss, to escape liability upon the pretext that one of the general provisions of a printed policy, intended to cover every conceivable case, had been violated, would be in contravention of the decisions of this court from the case of *West Rockingham Ins. Co. v. Sheets*, 26 Gratt. 854, decided in November, 1875, to the latest expression of the court on the subject, found in the case of *Union Assur. Soc. of London v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896, decided in June, 1903.

In the case of *Wytheville Ins. etc. Co. v. Teiger*, 90 Va. 277, 18 S. E. 195, the policy contained a provision "that in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company," and the court held: "When an insurance company clothes a person with apparent authority to deliver policies and receive premiums, as was done in this case, it is estopped, after a policy is delivered as a valid contract to an innocent holder, to set up the defense that the agent acted without written authority from the company. Such a defense, if sustained, ⁴²⁷ would operate as a gross fraud, and can receive no countenance in a court of justice. If in such case a waiver were not implied, the delivery of the policy would be not only an unmeaning, but a deceptive and fraudulent ceremony"; citing *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389-395, 26 Am. Rep. 364; *Life Ins. Co. v. Miller*, 12 Wall. 285, 24 L. ed. 410; 2 May on Insurance, 3d ed., sec. 360, and other authorities.

It was insisted on behalf of the insurance company that the decision in *Sulphur Mines Co. v. Phenix Ins. Co.*, 94 Va. 355, 27 S. E. 24, is opposed to the doctrine contended for on behalf of the defendant in error. An examination of that case, however, shows that the question raised here was not involved. There the policy contained a provision that it should be void if the property was or should become encumbered, unless consent thereto should be indorsed on the policy by an authorized agent

of the insurance company. The court held that such an encumbrance, unknown to the company, avoids the policy, although it was not customary to make that inquiry when policies were issued to large corporations. It was not pretended in that case that the agent who effected the insurance knew of the encumbrance, or made any representation to the assured in regard to it. It was, therefore, a breach by the assured of an express condition of the policy, unaffected by extraneous circumstances, and the court properly held that the policy was avoided.

It was also argued that the established doctrine of this court, namely, that an insurance company will not be heard to say that an agent of their own selection has exceeded his powers, and has not communicated to them facts made known to him by the assured, is subject to the qualification, unless it can be shown that special limitations upon the powers of the agent are known to the assured, or plainly appear from the nature of the agent's employment. ⁴⁸⁸ The contention is that a provision in a policy such as is contained in the policy in this case, ipso facto, carries notice of the restrictions on the powers of the agent home to the assured.

If that contention were true, it would practically abrogate the doctrine of this court in all cases, for the rule is predicated upon the fact that the dealings of the agent have been such that a policy which, according to its letter, was violated in its inception, and void ab initio, must be upheld on the ground that the agent has so dealt with the assured as to estop his principal from setting up and taking advantage of what would otherwise have operated a forfeiture. The contention presents a striking illustration of arguing in a circle. The insurance company, it is said, is estopped from relying upon the forfeiture prescribed by the policy, by reason of the conduct of its agent, which constitutes a fraud upon the rights of the assured; but the assured cannot avail himself of the estoppel, because to do so would contravene the provisions of the policy.

The true interpretation of the qualification of the rule is that the assured must have actual notice of the limitations placed upon the agent's powers, either by having his attention called to the stipulation of the policy containing it, or otherwise, and not on the constructive notice afforded by the circumstance that the policy contains the limitation.

In May on Insurance, Parsons' edition, section 137, at page 244, Mr. Parsons, referring to decisions where it is held that, in case of restrictions in the policy upon an agent's power,

he cannot bind the company by acts in excess of such limitation, says:

"It seems very doubtful if the doctrine of these cases is entirely correct. The assured has a right to suppose that a general agent has all the powers incident to his business unless he has knowledge to the contrary, and usage may overcome the provisions of the policy. . . .

439 "Prudent men are accustomed to rely upon the acts and statements of the agents, and they should be protected in so doing. . . . As to waivers taking place after issue, it is very proper to require the assured to look at his policy and conform to it, and the limitations of the agent's authority should be effective unless, by a course of business or otherwise, the company has waived the limitation on the agent's power of waiver."

While, it must be confessed, there is great divergence of opinion on the subject, the rule as stated by Mr. Parsons is believed to be more in consonance with justice and reason, and has been uniformly upheld by the decisions of this court for the past thirty years.

Mr. Joyce in his admirable work on Insurance (volume 1, section 439), after an exhaustive discussion of the subject and review of the authorities, reaches the conclusion that an agent may waive conditions, notwithstanding the inhibition in the policy.

A strict adherence to the opposing theory would not only operate disastrously to the assured, but to the business of the insurer as well, for in the practical conduct of such business, it would be impossible to submit every departure from the company's rules to the principal office or to the board of directors.

Much reliance has been placed by counsel for the plaintiff in error upon the opinion of Mr. Justice Shiras in the case of Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 23 Sup. Ct. Rep. 183, 46 L. ed. 214, reversing the judgment of the circuit court of appeals of the eighth circuit. While the pronouncements of that great court must always command the highest respect, its judgment in the particular case is deprived of much value as a precedent by the circumstance that it is not in harmony with many former decisions of that court, and that the chief justice, Mr. Justice Harlan, and Mr. Justice Peckham did not concur in the opinion of the majority. Since that decision was rendered, Mr. Justice Shiras has retired 440 from the bench, and been succeeded by Mr. Justice Day, who presided in the circuit court of appeals in the case of

Queen Ins. Co. v. Union Bank etc. Co., 111 Fed. 699, 49 C. C. A. 555, where a different conclusion was reached. So there are now on that bench at least four justices who entertain views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow the questionable ruling of another tribunal.

It follows from these views that the judgment complained of is without error and must be affirmed.

A Warranty in an Insurance policy that the title to the property is in the insured is waived when the authorized agent of the insurer, before delivery of the policy and payment of the premium, is informed that the title to the property is in the wife of the insured, and stated that that made no difference: *State Mutual Ins. Co. v. Latourette*, 71 Ark. 242, 100 Am. St. Rep. 63. And notice to the insurance agent that the insured has only a bond for title is notice to the insurer of the state of the title, and estops it from setting up that the insured falsely stated an ownership in fee: *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295. See, too, *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370.

OLD DOMINION STEAMSHIP COMPANY v. COMMONWEALTH.

[102 Va. 576, 46 S. E. 783.]

TAXATION—Situs of Vessels.—The legal situs of vessels for the purposes of taxation is within the state, although they are owned by a nonresident steamship company and enrolled under a national statute at some port outside the state, and engaged in part in interstate commerce, if they ply entirely between ports within the state and act as adjuncts to the main line of ocean-going vessels of such company, for the purpose of delivering freight and passengers to it, although they issue bills of lading and tickets for through passage to points outside the state. (p. 858.)

W. H. White, for the appellants.

W. A. Anderson, attorney general, for the state.

577 By the COURT. The facts presented by the transcript of the record of the finding aforesaid are as follows: That the Old Dominion Steamship Company was a nonresident corporation, having been incorporated by the Senate and House of Representatives of the state of Delaware; that it was then and had been for many years theretofore engaged in the trans-

portation of passengers and freight on the Atlantic Ocean and communicating navigable waters, between the city of New York, in the state of New York, and Norfolk, and certain other ports within the state of Virginia. That said steamship company, in the prosecution of its said transportation business, owned and operated the vessel property above named; that these vessels, with the exception of the tug "Germania," whose movements and use will be hereinafter stated, visited various ports or points within the state of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside the state of Virginia; that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort, where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and the ultimate destination, namely, New York, and ⁶⁷⁸ elsewhere outside of Virginia, was reached; that any other business transacted by the above-named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the state of Virginia with the name and port of such enrollment painted on the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade, were then used on old established routes upon navigable waters within Virginia as follows, to wit: 1. The steamer "Hampton Roads," between Fort Monroe and Hampton and Norfolk; 2. The steamer "Mobjack," between points in Mathews and Gloucester counties and Norfolk; 3. The steamers "Luray" and "Accomac," between Smithfield and Norfolk; 4. The steamer "Virginia Dare," between Suffolk and Norfolk; 5. The steamers "Berkeley" and "Brandon," between Richmond and Norfolk; and the steamers "Berkeley" and "Brandon" ply between Richmond and

Norfolk. These two steamers were completed in the year 1901 or early in 1902, one of them having been constructed at the William R. Trigg shipyard in the city of Richmond, and the other outside of the state of Virginia. Early in the year 1902, they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route and since that time, the Old Dominion Steamship Company has by public advertisement ⁸⁷⁹ called attention to the fact that these two steamers were especially fitted in the matter of stateroom accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the state of Virginia for a license to sell liquor at retail on each of these steamers, and on July 1, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30, 1903. On or about the same time, the said steamship company complied with the revenue laws of the United States and paid the necessary revenue tax through the custom-house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903, the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, approved April 16, 1903, and so obtained licenses for the year 1903-04 to sell liquor at retail on each of these steamers on their route between the city of Richmond and Norfolk, and likewise, on or about the same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

6. The steam tug "Germania," which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship

Company, and the transferring from different points in those ⁵⁸⁰ waters freight from connecting lines destined to points outside of Virginia.

And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal situs of the vessels and barges assessed for taxation by the finding of the state corporation commission is, for that purpose, within the jurisdiction of the state of Virginia, and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned by a nonresident corporation, that they may have been enrolled under the act of Congress at some port outside the state of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore, it seems to the court here that the finding of the state corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant thirty dollars' damages, and its costs by it about its defense expended upon this appeal. All of which is ordered to be entered upon the order-book here, and certified to the state corporation commission, to be entered of record in its order-book there, as required by law.

Affirmed.

The Situs of Vessels for the purpose of taxation is discussed in the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 471-473. According to *Northwestern Lumber Co. v. Chehalis*, 25 Wash. 95, 87 Am. St. Rep. 747, ocean-going tugs registered in another state and owned by a foreign corporation are taxable in the state where they have their situs, and where they are engaged in plying wholly within the waters of the state.

COLIN v. WELLFORD.

[102 Va. 581, 46 S. E. 780.]

BUILDING ASSOCIATIONS—Insolvency—Rights of Withdrawing Members.—A withdrawing member of a building association, which is in fact insolvent at the time of the notice of withdrawal, though no steps have been taken to wind up its affairs, is not a creditor of the association, and is only entitled to share pro rata with the other stockholders of the association, although he has compromised his claim with the association and has taken its notes therefor for less than would be the withdrawal value of his stock if the association were solvent. (p. 863.)

BUILDING ASSOCIATIONS—Insolvency—Rights of Members—Withdrawal.—If insolvency of a building association exists as a fact, the right of the shareholders to equality in the distribution of the assets of the association attaches as paramount, and cannot be defeated by a notice of withdrawal upon the part of a member, nor by any dealing between him and the officers of the association which falls short of actual payment. (p. 864.)

L. R. Page, for the appellant.

B. R. Wellford, for the appellee.

583 KEITH, P. The record in this case discloses the following state of facts: The appellant was the owner of certain certificates of installment and prepaid stock in the United Banking and Trust Company, and, in the exercise of his right under the charter and by-laws of the company, on the 25th of January, 1901, he gave written notice of the withdrawal of his certificates of stock, which notice was duly served on the company, and accepted by it as sufficient and regular in every respect. On the 28th of March, 1891, sixty days (the period required under the by-laws) having expired, he made demand upon the company for the sum due him and was promised payment at an early day. The promise was not kept. He was put off from time to time, and on or about the 22d of May, 1901, was informed that the board of directors rejected his demand for the payment of his claim in full, and offered four thousand six hundred and five dollars and seventy-five cents in compromise and settlement, to be paid in thirteen monthly installments, bearing interest at the rate of three per cent per annum. This proposition was accepted by appellant, and upon the receipt of the obligations of the company, as provided by the settlement, he surrendered his certificates of stock, which were marked "canceled and withdrawn," and appellant's name was stricken

from the books of the company as a shareholder. The first of the thirteen monthly installments was paid at maturity, but before the second became due a bill was filed to wind up the affairs of the company, and on the same day receivers were appointed, who refused further payment to appellant.

In July, 1902, appellant filed his petition, asking to be placed upon the footing of a creditor of the company for the amount of ~~sss~~ the twelve matured and unpaid obligations above referred to, and the matter was referred to a commissioner, who reported adversely to appellant's claim. The exceptions to that report were overruled by the court, a decree was entered denying the prayer of petitioner, and the case is before us for review.

The report of the commissioner proceeds upon the theory that the company was insolvent at the date of the notice of withdrawal, and the opinion of the learned chancellor is to the same effect. There is a strong presumption in favor of the correctness of this finding of fact on the part of the commissioner, thus approved by the court, and there is nothing in the record to lead us to a contrary conclusion. We shall, therefore, proceed with the consideration of the case, taking the insolvency of the company, at least as early as January, 1901, as a fact established. The term "insolvency," as here used, has no reference to outside creditors, for there are none, but to the inability of the company to satisfy the demands of its own members.

We have had no adjudication in this state upon the precise question here involved.

In Andrews v. Roanoke Bldg. Assn., 98 Va. 445, 36 S. E. 531, 49 L. R. A. 659, we held that a withdrawing member of a building association does not lose all of his rights and interests as such in the association. Though he is not, strictly speaking, a creditor of the association, he can maintain no suit to recover the withdrawal value of his stock until a fund for its payment has been provided, and until then the act of limitation does not begin to run against his demand. On the other hand, it is the duty of the association to provide such a fund, in accordance with its charter and by-laws, and in default thereof the member may ask the appointment of a receiver, and, it may be, a winding up of the affairs of the association.

In Eastern Bldg. etc. Assn. v. Snyder, 98 Va. 710, 37 S. E. 298, it was held that a solvent building association, in the absence of bad faith on its part, is not in default, and cannot

524 be sued by a withdrawing member, until there are funds in the treasury of the association out of which he is entitled to be paid.

We are in this case called upon to define the rights of a withdrawing member of a building association which was insolvent at the time notice of withdrawal was given, though no legal steps had been taken to wind up its affairs, and whose insolvency, though in fact existing, was not then notorious.

As shown in *Andrews v. Roanoke Bldg. Assn.*, 98 Va. 445, 36 S. E. 531, 49 L. R. A. 659, the tendency of the English courts, while recognizing that withdrawing members are not creditors of the association in the ordinary sense of the word, has been to allow them a preference over those who have given no withdrawal notice: *Sibun v. Pearce*, L. R. 44 Ch. Div. 354.

It was held, however, in *Re Sunderland*, L. R. 24 Q. B. Div. 394, that the rule of the company provided only for withdrawal from the societies while they were, or were believed to be, solvent, and that, therefore, notices of withdrawal which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up.

The strong preponderance of the authorities in this country, where insolvency exists, seems to be in accord with the decision of the supreme court of Pennsylvania in *Christian's Appeal*, 102 Pa. St. 184. The court said: "While, in a qualified sense, withdrawing stockholders may be considered creditors of the association, their rights, as against those with whom they have been associated, are very different from those of general creditors, whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right, under certain limitations and restrictions, to demand and receive their proportionate share of the accumulated fund; but if bad investments have been made, or losses have been sustained, before 525 actual withdrawal, they must bear their just proportion thereof. . . . But the right of withdrawal, and the extent to which it may be exercised, presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association.

"When a building association has failed to fulfill the object of its creation, and has become hopelessly insolvent, it cannot

be justly or equitably wound up on any other principle than that above suggested. After expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed pro rata among those whose claims are based upon stock of the association, whether they have withdrawn, and hold orders for the withdrawal value thereof, or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof; . . . and while it may be true that a stockholder may recover judgment against the corporation, and thus become, in a certain sense, a creditor thereof, he is nevertheless not a creditor within the meaning of our assignment laws."

The doctrine of Christian's Appeal has been quite generally accepted by courts and text-writers: *Chapman v. Young*, 65 Ill. App. 131; *Gibson v. Safety Homestead Assn.*, 170 Ill. 46, 48 N. E. 580, 39 L. R. A. 202; *Heinbokel v. National Sav. Assn.*, 58 Minn. 340, 49 Am. St. Rep. 519, 59 N. W. 1050, 25 L. R. A. 215; *Hohenshell v. Loan Assn.*, 140 Mo. 566, 41 S. W. 948; *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 64 Am. St. Rep. 152, 72 N. W. 306, 38 L. R. A. 183.

The text-writers are of a like opinion. Endlich on Building Associations, second edition, section 108, says: "The right of withdrawal, however, exists and may be exercised only while the association is a going concern, or the series to which the stock belongs running. It cannot be exercised ~~see~~ when the stock has reached par, and the association or series exists only for the purpose of liquidation. Nor, as has been settled in England, can it be exercised where the association is, at the time, known to be insolvent. The provisions for withdrawal are not intended to apply to the latter, any more than to the former case. 'It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of the others. . . . The rule (as to withdrawals) seems. . . . not to contemplate any such contingency as a suspension of its business, and therefore only to provide for a withdrawal from the society while it was, or was believed to be, still solvent.' That this doctrine is correct, as far as it goes, is self-evident. But there is no reason why it should not go a step further by omitting the qualification introduced by reference to the notoriety of the

fact of insolvency. Apart from the consideration that one who knows the association to be insolvent is guilty of bad faith toward his fellow-members when he attempts to get himself paid at their cost, there is every bit as much reason why an actual state of insolvency, though unknown at the date of the giving of a withdrawal notice, should prevent it from becoming effectual. The payment of the claims in the one case, as in the other, would give an unfair advantage to the withdrawing, and entail an undue injury upon the remaining members. Accordingly, it has been decided in Pennsylvania that the fact of insolvency of an association negatives the right of anyone to obtain a priority over his fellows by giving notice of withdrawal. The right of withdrawal presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association.' Whilst, therefore, it has been held that members who had given notice to withdraw, and whose notices had matured before the society's insolvency was manifest or declared, were entitled to stand upon their rights as withdrawing members, even to the detriment of ⁵⁸⁷ those who had not withdrawn or whose notices had not matured, the better and more logical doctrine would seem to be that the existence of a state of insolvency at the time of the giving of the withdrawal notice, ascertained at any time before actual payment of the claims, renders the notice abortive, and destroys the right to withdraw, or to claim any benefit under the notice already given. This principle does not, of course, invalidate settlements already made in good faith with withdrawing members who have been paid out, nor subject the right of withdrawing members to claim payment, in accordance with the provisions relating to withdrawals, to jeopardy by reason of causes of insolvency arising after notice of withdrawal": Thompson on Building Associations, 2d ed., p. 289.

It seems, indeed, to be the accepted American doctrine that, when an association is in fact insolvent, a withdrawing member has only the right to a pro rata share in the distribution of its assets. Nor is the situation affected by any assurance given by the officers of the association to the withdrawing member as to the solvency of the society at the date of the notice. The authorities cited establish the principle that, when insolvency exists as a fact, the right of the shareholders to equality in the distribution of the assets attaches, and constitutes a paramount equity in their favor. The fact of insolvency being established, and the right to equality of distribution having attached.

it cannot be defeated by a notice of withdrawal upon the part of a member, nor by any dealing between him and the officers of the association which falls short of actual payment.

In *Rickert v. Suddard*, 80 Ill. App. 204, it was held that "where a member gives notice of his withdrawal, and is paid by a check upon the funds of the association in bank, but before such check is presented for payment the funds of the association are withdrawn and the association itself becomes insolvent, the rights of the holder of the check are to be determined by the solvency of the association at the time that the check was given," ⁵⁸⁸ and that the insolvency of the association was a question of fact to be determined in the same way as similar questions of fact arising in other causes.

In *Columbus Bldg. Assn. v. Kriete*, 192 Ill. 128, 61 N. E. 510, the withdrawing stockholder had reduced his claim to a judgment, but the court held that this gave him no priority over other stockholders.

Appellant had perfected his notice to withdraw, and, if the association could be treated as a going concern, he should have been paid the full withdrawal value of his certificates. The association declining to pay him in full, he suffered an abatement, and now claims to be entitled to relief by virtue of a compromise entered into between him and his debtor. The principle of equality, as established by the authorities cited, would in any event be fatal to this contention. The principle of equality which defeats the appellant, were he standing alone upon his notice of withdrawal, is sufficient to repel the equity which he asserts, and sufficient to defeat his right to recover by virtue of his so-called compromise, for it strikes at the root of the power of the officers of an insolvent association to create any preference among stockholders in the distribution of its assets. A view of the case may well be taken in which the willingness to compromise may be construed as tending to impair rather than strengthen the position of appellant. The knowledge that there were many other stockholders in like case with himself who had, in advance of action upon his part, given notice of withdrawal, and whose demands had not been satisfied; the fact that there was no money in the treasury of the association which could properly be appropriated in payment of withdrawal claims, and that he was ready to accept in satisfaction of his demand a material abatement of its amount, not to be paid in cash, but in promises to pay in instalments distributed over a period of thirteen months, is persuasive that appellant

was aware of the financial condition of the association. As was well said by the ⁵⁸⁹ learned chancellor in his opinion: "It must have been manifest to Colin, in taking the notes, that there were no funds on hand properly applicable to the discharge of his claim, for the by-laws (of the association), with which Colin must be presumed to have been acquainted, plainly contemplated that these withdrawals should be settled by cash payments made out of funds already in hand, derived from fixed sources, and would not be settled by notes. The very manner in which the notes were made out called attention to the irregularity of the settlement. Colin has obtained an apparent advantage which the principle of mutuality applicable to the distribution of the assets of an insolvent company of this kind does not permit him to hold. These associations partake of the nature of partnerships, and no member can take any advantage of his fellows not clearly legal. The settlement made is not so far executed as to be beyond recall, and Colin can be remitted to his position as stockholder without any injustice to him."

We are of opinion that the decree appealed from should be affirmed.

The Insolvency of Building and Loan associations as affecting the rights and liabilities of the members is discussed in the monographic note to Curtis v. Granite State Provident Assn., 61 Am. St. Rep. 24-30, and the recent case of Spinney v. Chapman, 121 Iowa, 38, 100 Am. St. Rep. 305, and cases cited in the cross-reference note thereto.

TAYLOR v. COMMONWEALTH.

[102 Va. 759, 47 S. E. 875.]

WATERS—Navigable—Ownership of Lands Under.—Navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by it within its discretion for the benefit of the people, and the only limitation upon such power is that the state cannot interfere with the authority of the national government in regulating commerce and navigation. (p. 871.)

WATERS—Navigable—Ownership of Land Under—Riparian Rights.—The fee simple title of a riparian owner on a navigable stream ends with ordinary low-water mark, but between that point and the line of navigability, he has certain qualified rights, among them being the right of access to the navigable part of the stream from the front of his land, the right to build wharves or piers, for his own use or the use of the public, and such other rights as may be

granted him by statute, subject to legislative regulation for the protection of the public, and its rights. Such riparian rights are property and must be protected as such. (p. 875.)

WATERS—Navigable—Exercise of Riparian Rights.—Riparian rights possessed by an owner between ordinary low-water mark and the point of navigability, and the rights of the state in the ownership of the soil, must be exercised, if possible, so that the one shall not necessarily disturb or impair the enjoyment of the other. (p. 877.)

WATERS—Navigable—Riparian Rights—State Rights.—A riparian owner who is not disturbed in an existing or contemplated riparian right cannot complain because the state leases to another a portion of the bed of a navigable stream in front of such owner, but beyond ordinary low-water mark, for the purpose of sinking a well and using the water therefrom. (p. 879.)

WATERS—Navigable—Ownership of Soil Under and Rights Therein.—The navigable waters and the soil under them and whatever it contains, beyond ordinary low-water mark, and within the territorial limits of the state, belong to the state, which alone has the right to develop any hidden sources of wealth therein for the common benefit of all of its citizens. (p. 879.)

WATERS—Navigable—Exercise of Riparian Rights.—A riparian owner on a navigable stream will not be permitted capriciously and arbitrarily to exercise a riparian right in a manner most injurious to others, and not more beneficial to himself, but he will be required to exercise such right in a manner least injurious to others, if that end can be accomplished without a wrong to him. (p. 879.)

WATERS—Navigable—Ownership of Land Under.—Riparian Owners on a navigable stream have no title as owners to the water between low-water mark and the channel of the stream, nor to the soil beneath it, nor to what such soil contains. The ownership of such water and soil and its contents is in the state. (p. 880.)

McGuire & Riely and R. Stiles, for the appellant.

W. A. Anderson, attorney general, and I. Diggs, for the appellees.

⁷⁶⁰ **KEITH, P.** Appellant filed her bill in the circuit court of the city of Richmond, in which she states that she is the owner in fee simple of a tract of land in Gloucester county, known as "Rosewell," containing two hundred and fifty acres, fronting on York river, being a portion of a tract which was the property of her father, now deceased, allotted to her by a decree of the circuit court of Gloucester county; that as riparian proprietor her rights in the soil under the waters of York river extend to the channel or navigable portion of the river, and that from the original grant from the English crown of this land down to and including the lifetime of complainant's father, the proprietors of "Rosewell" had been in the habit of leasing the oyster lands upon their waterfront; that the last person who held such a lease from the proprietor of "Rosewell,"

while still occupying the relation of tenant to complainant, accepted from the commonwealth a subsequent lease of the flats, or oyster-planting grounds, in front of "Rosewell"; that about the year 1892, while said lessee was occupying the "Rosewell" flats, under the circumstances above set out, an artesian well was sunk between low-water mark and the channel or navigable portion of York ⁷⁶¹ river, and on the land of which complainant claims she is the owner and riparian proprietor; that the water from this well has mineral properties of great value, and that the lessee and others united in the formation of a company for the purpose of selling the water, which company was granted a charter by the circuit court of the city of Richmond in March, 1896, under the style of the Colonial Water Company, since which time it has sold great quantities of water without the consent of complainant; that the Colonial Water Company occupies and claims to hold the ground on which the well is located by virtue of the oyster lease above set forth, but that said lease conveys to the water company no title to the ground. The bill further shows that at the session of 1899-1900 the general assembly passed "An act to lease for a term of years ten acres of land lying under the waters of York river, below low-water mark, in the county of Gloucester, including an artesian well thereon, and to provide for a survey of same, and for fixing the price to be paid therefor per annum; and to permit said company to erect buildings and make improvements thereon, and to provide for the determination of all proper questions which may arise between the parties to any suit brought under this act" (Acts 1899-1900, p. 797); that, acting under the provisions of this statute, the Colonial Water Company has caused a survey and plat to be made by the county surveyor of Gloucester county of ten acres of the land of complainant, including the well—that is to say, the land of which complainant is the owner and riparian proprietor—and that the company has caused that survey and plat to be returned to the clerk's office of Gloucester county, and posted a notice at the front door of the courthouse on the 4th of May, 1900, to the effect that said survey and plat had been filed in compliance with the provisions of the act of assembly aforesaid, but that in fact the survey, plat and notice are erroneous, and do not comply with the requirements of said act; that complainant is advised that the act aforesaid authorizes ⁷⁶² the lease of ten acres of land, including the artesian well, only on the condition that it shall be determined by the court that the com-

monwealth is the owner of the land, and that the private rights of no person shall be infringed upon; that it in plain terms declares it to be the purpose of the sovereign power of the state that the private rights of complainant shall not be interfered with or infringed upon, whether the commonwealth be or be not the owner of said land; that even though the commonwealth be the owner it by no means follows from the act that a lease may be made to the Colonial Water Company, because it is expressly provided by its terms: 1. That no natural oyster-bed, rock or shoal shall be included in said ten acres of land; 2. That the private rights of no person shall be infringed upon; and 3. That navigation in York river shall in no manner be obstructed or impeded; that it further declares that complainant's rights of every character, existing at the time of its passage, whether as owner of the land, riparian proprietor, or otherwise, shall be respected, and shall be paramount and superior to any rights which can by any possibility be acquired by the Colonial Water Company by virtue of said act; that the commonwealth is not the owner of the land in controversy, but that, on the contrary, complainant is its sole owner, including said artesian well, and further that even though the commonwealth were such owner, the private rights of complainant would be grossly interfered with and infringed upon by any lease made under said act of March 5, 1900; that, without waiving any of her said rights, attention is called to the fact that at the time of the passage of the act of March 5, 1900, and for a long time previous thereto, complainant had and still has the statutory right to select any portion of the oyster-planting ground fronting on "Rosewell," whether occupied by another person or not, and have same assigned to her exclusive use, provided only that said assignment does not exceed half an acre (see section 2137 of the code, as amended by acts of ⁷⁶³ 1893-94, p. 842); that complainant has never relinquished and now claims the right to have assigned to her under said statute one-half an acre of said ground, including the Colonial well, and further claims that the lease of ten acres of land, as provided by the act of March 5, 1900, cannot be granted without infringing upon this and other rights of complainant, none of which she relinquishes, but all of which she claims and insists upon.

The prayer of the bill is that the well and the water therefrom be declared the property of complainant; that it be decreed that no lease can be made under the provisions of the

act of March 5, 1900, that the lease under which the Colonial Water Company claims to hold said well conveys no title to it whatsoever; and that said company may be compelled to surrender the possession thereof to complainant, and for general relief.

To this bill the commonwealth of Virginia and the Colonial Water Company were made parties defendant, and filed their demurrer upon the following grounds:

1. The bill alleges that the plaintiff is the owner in fee simple of the soil of the bed of York river, between low-water mark and the channel or navigable part of said stream, while the "demurrants insist that the right of plaintiff extends only to low-water mark, and that she has no interest in the soil of the bed of said river, but that the soil of said bed is the property of the state of Virginia, so declared by statute, and the state, through the legislature, has the authority to rent portions of the said bed to the demurrant, or anyone else."

2. That if plaintiff has any right whatever in the soil of said river between low-water mark and the channel or navigable portion of said river, it is only the right to pass over the surface of the water in boats, vessels or river craft, or to erect wharves, piers or bulkheads opposite her said land, provided the navigation be not obstructed, nor the private rights of any person be otherwise injured thereby; and that should the plaintiff ⁷⁶⁴ undertake to construct or build any such wharf, pier or bulkhead from her shore to a point of navigability, she would be required to so construct them as not to interfere with the said well of the demurrant.

3. That "the bill alleges that the plat, notice and proceedings under the act of March 5, 1900, are erroneous, and do not comply with the requirements of the act; that these acts were performed by the county surveyor, and are presumed to be correct, and the bill should point out wherein that officer failed in the discharge of his duties."

4. That "plaintiff claims one-half acre of land for oyster-planting purposes, but this right does not give her the ownership of the well, and she would be required to use said land for oyster purposes, so as not to interfere with the well and she would not thereby acquire ownership or control of the well, nor the fee simple to the soil of the bed of the river."

The Colonial Water Company also filed a cross-bill, but it is not at present necessary to consider the questions which it presents.

When the case came on to be heard the judge of the circuit court filed a learned and able opinion, and entered a decree sustaining the demurrer and dismissing complainant's bill, but reserving for further consideration questions between the Colonial Water Company and the commonwealth of Virginia, arising upon the cross-bill. That decree is before us for review.

By section 1338 of the code it is declared, that: "All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking or catching oysters and other shell-fish, subject to the provisions of chapters 95, 96 and 97, and any future laws that may ⁷⁶⁵ be passed by the general assembly; and no grant shall hereafter be issued by the register of the land office to pass any estate or interest of the commonwealth in any natural oyster-bed, rock, or shoal, whether the said bed, rock, or shoal shall ebb bare or not." And section 1339, subject to the provisions of the section just quoted, extends "the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks and shores, and the rights and privileges of the owners of such lands to low-water mark, but no farther."

Is section 1338 a mere self-servient declaration of title, an arbitrary assumption of right upon the part of the state, or is it in accordance with the law of the land, as commonly received and understood? The discussion of the subject invited us to explore the past, and to investigate the power and authority, the interest and the title of the English crown in the soil under the tidal waters of that realm; to discriminate between the power of the crown before the adoption of the *Magna Charta*, and as limited by that instrument. The difficulty of the task and the consciousness that at this day we could throw no light upon a subject which has been so often considered by the ablest jurists disposes us to follow the example of Chief Justice Taney, who, in the case of *Martin v. Waddell*, 16 Pet. 407, 10 L. ed. 997, wisely said: "We do not propose to meddle with the point as to the power of the king since *Magna Charta* to grant to a subject a portion of the soil covered by the navigable waters of the kingdom. . . . For when the Revolution took place the people of each state became themselves sovereign;

and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation."

⁷⁶⁶ In *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269, Justice Curtis, delivering the opinion of the court, says: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the state, not only subject to, but in some sense in trust for the enjoyment of certain public rights."

The case of *McCready v. Commonwealth of Virginia*, reported in 94 U. S. 391, 24 L. ed. 248 (27 Gratt. 985), is one of peculiar interest in the consideration of this case. It originated in the county of Gloucester in this state, and involved the constitutionality of an act of assembly, which forbade the planting of oysters in the waters of the state by any person not a resident of the state. The case came to this court, which held, Judge Anderson delivering the opinion, that the navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by it within its discretion for the benefit of its people, the only limitation upon that power being that it could not interfere with the authority of the government of the United States in regulating commerce and navigation. Upon a writ of error from the supreme court of the United States to the judgment of this court, Justice Waite, after reviewing numerous cases upon the subject declares that the principle has been long settled "that each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, ⁷⁶⁷ has been granted to the United States. There has been,

however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters, and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

Illinois Cent. Ry. Co. v. People of the State of Illinois, 146 U. S. 387, 13 Sup. Ct. Rep. 110, 36 L. ed. 1018, contains an interesting discussion of this whole subject. The opinion of the majority was delivered by Mr. Justice Field, and in it he states it to be "the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide-waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties." He then shows that the same doctrine is held applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations, and which possess all the general characteristics of open seas, except with respect to the freshness of their waters, and the absence of the ebb and flow of the tide. "In other respects they are inland seas, and there is no reason or principle for ⁷⁶⁸ the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide-waters that is not equally applicable to its ownership of, and dominion and sovereignty over, lands covered by the fresh waters of these lakes." As to the character of the title held by the state, he concludes that it is different from that which states hold in lands intended for sale. "It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fish-

ing therein freed from the obstruction and interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and so long as their disposition is made for such purposes no valid objections can be made to the grants. It is grants or parcels of lands under navigable waters that may afford foundations for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the benefit of the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used ⁷⁰⁰ in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." He further declares in this opinion that the state can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace. "In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

This opinion was concurred in by three of the members of the court, while a dissenting opinion was delivered by Justice

Shiras, concurred in by two of the justices, and the chief justice and Mr. Justice Blatchford did not sit.

The dissenting opinion maintains to the fullest extent the right of the state over the soil under tide-waters within its limits, with the consequent right to dispose of the title to any part of the soil in such manner as it may deem proper, subject only to the paramount right of navigation.

The position of the majority of the court is fairly summed up in the first syllabus of the report. "The ownership of and dominion and sovereignty over lands covered by tide-waters, and the fresh waters of the Great Lakes within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation ⁷⁷⁰ of commerce." While, in the view of the minority, the right of a state is absolute, and its control without limit.

In *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. ed. 331, this subject was further discussed by Mr. Justice Gray, who delivered the opinion, in which many authorities are considered, and the conclusion reached that the lands under tide-waters are vested in the states for the benefit of the whole people, within their respective borders, subject to the rights surrendered by the constitution to the United States: See, also, *Commonwealth v. Alger*, 7 Cush. 53; *Florida v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Gough v. Bell*, 21 N. J. L. 156; *Langdon v. New York*, 93 N. Y. 129; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565.

The authorities which we have cited abundantly establish the proposition asserted by the court in *McCready v. Commonwealth*, 27 Gratt. 985, that the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state, and demonstrate that section 1338 of the code is a declaration of right in the state, sanctioned and supported by the common law: See, also, *French v. Bankhead*, 11 Gratt. 136.

Let us look at the case from another point of view. The claim of appellant rests upon her right as riparian owner, by virtue of which she asserts title to the bed of the river between low-water mark and the line of navigability, and to its exclusive use and enjoyment, subject only to the paramount right of

the United States and the right of fishery, which she concedes to the commonwealth as trustee for its citizens. It is for the plaintiff to maintain her right. The possession of the defendant is sufficient, except as against the claim of one having a better right to the possession.

At common law the title of the owner of land bounded by a tidal stream extended to high-water mark, and no farther. By an act of the legislative assembly of Virginia, passed in 1679 ⁷⁷¹ (2 Hen. Stats. 456), it was declared that "every man's right, by virtue of his patent, extends into the rivers or creeks so far as lower water mark," and our present statute upon the subject is found in section 1339 of the Code, which is set out in the beginning of this opinion: See *Garrison v. Hall*, 75 Va. 159; 1 Lomax's Digest, 661; 1 Revised Code 1819, c. 87, p. 341. The effect of this legislation is to extend the limits or boundaries of land "by operation of law down to ordinary low-water mark, and the right to the soil between ordinary high and low-water mark annexed as incident or appurtenant to the adjacent land": *French v. Bankhead*, 11 Gratt. 136; *Groner v. Foster*, 94 Va. 650, 27 S. E. 493.

The fee simple title, therefore, of a riparian owner ends with low-water mark. Between that point and the line of navigability the riparian owner has a qualified right, of which Justice Miller, in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, speaks as follows: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing wharf or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This riparian right is property, and is valuable; and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation."

This court said, with respect to this subject, in *Norfolk City v. Cooke*, 27 Gratt. 435: "This right of the riparian owner is not a mere license or privilege, but is property, ⁷⁷² in the

soil, up to the line of navigability, though covered by water; for the wharf, pier or bulkhead can only be built on the soil. It is not a mere easement to pass over the water, or a privilege to use the surface, but property in the soil under the water, on which to fasten and build such structures; and for this purpose and subject to the restriction that navigation shall not be obstructed, is as much property as the land above the margin of a navigable stream." This is a broad statement of the law, which we are not called upon in this case either to criticise or approve further than to remark that we think it well established that the right to build wharves is one which is subject to state regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership.

Lewis on Eminent Domain, section 78, after stating the opinion of those writers and judges who maintain that the riparian owner has no private rights which are appurtenant to his land other than those of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public has not, says, "there are cases which hold that the riparian owners upon waters, the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the state, or the public. It is assumed that this title gives the state the same absolute and exclusive control of the waters and their bed as an individual possesses over his private property. But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts, and the relations between the proprietors of adjoining lands. The state holds the title to public waters as a trustee, merely, for the use of all the public⁷⁷³ in common. The very object in declaring the title in the public is the better to secure this common use and benefit. . . . It is more reasonable, more logical and more just to say that these privileges are in fact rights, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the state to use and improve the waters as shall best subserve the common rights of all."

We have reached the conclusion that the title to the bed of the river in question is held by the commonwealth for the benefit of all of its citizens, and that the riparian owner has certain rights with respect to it. These rights are enumerated in section 83 of the second edition of Lewis on Eminent Domain, as follows: "1. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water; 2. The right of access to the water, including a right of way to and from the navigable part; 3. The right to build a pier or wharf out to navigable water, subject to any regulations of the state; 4. The right to accretions or alluvium; 5. The right to make a reasonable use of the water as it flows past or leaves the land."

These rights of the riparian owner and the commonwealth must be exercised, if possible, so that the one shall not unnecessarily disturb or impair the enjoyment of the other. Appellant has built no wharf or pier, nor any like structure, upon her premises, nor does it appear that she contemplates doing so. When she does exercise that right, it must be in accordance with such rules and regulations as the commonwealth imposes for the protection of the rights of the public. Nor does it appear that the right in the plaintiff of access to the water from her land, or of a right of way to and from her shore to the navigable ⁷⁷⁴ part of the stream, has been interrupted or threatened, and the other enumerated rights are not called in question in this record.

When the riparian owner complains of an injury done to him in respect to these rights, the question to be considered is, Does he present a case in which there has been any substantial interruption or impairment of his rights? Were he the owner in fee simple of the soil, any entry upon it without his consent would constitute a trespass, but having mere easements in the river, the riparian owner has no cause of complaint so long as he is permitted the full and undiminished enjoyment of these rights.

Two cases in the house of lords illustrate this position. The Duke of Buccleuch was the occupier, under a lease from the crown, of a house, the garden of which ran down to the Thames, where a wall protected it from the river, which flowed up to it at high water. There was a door in this wall, which was locked or opened at the pleasure of the plaintiff, and afforded him the means, at high water, of landing persons and goods, while at low water he was afforded the same privilege by a paved causeway, which ran from the door to the river. The

river was embanked under authority of an act of parliament, and a large strip of dry land was formed where the river had formerly flowed up to the garden, and a public road was made between this strip of land and the river, and the plaintiff claimed compensation under the act. It was held that the loss of the use of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road, were subjects to be considered as occasioning deterioration in the value of the property: *Duke of Buccleuch v. Metropolitan Bd. of Wks.*, 5 Eng. & I. App. 418.

In *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612, an appeal from the supreme court of Canada, it appears that Pion had a large manufacturing establishment upon the foreshore of ⁷⁷⁵ the river St. Charles, a navigable stream, and upon which appellants constructed an embankment, whereby access to the river was cut off. The embankment extended along the whole length of respondent's river front, and cut off access to the river, except at two openings, one in front of and the other adjoining respondent's premises, through which the river was accessible at certain high tides.

In both these cases damages were awarded, it appearing that the right of access was in one case destroyed, and in the other case so far interrupted as to be rendered of little value.

In the case before us, the property of the plaintiff is used merely for farming purposes. There has not been erected, and, as far as the record discloses, there is no purpose to erect, any pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised, or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. Is it reasonable that the commonwealth, holding title to the soil, is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being an owner of the adjoining shore, when the rights of each and all can be fully protected without diminution and without hindrance. If the time should come when the river front of the plaintiff shall be divided into lots whose owners find it necessary to their profitable enjoyment to erect piers and wharves upon them, if they engage in business which shall require exclusive access to the channel of the stream, it may be

that a case could then be presented more meritorious than that which we have under consideration, and in the light of changed conditions the court may be again called upon to consider the respective rights of the riparian owner, and those remaining ⁷⁷⁶ in the commonwealth, or which have been granted by her to others. The property in dispute was originally leased by the state as an oyster-planting ground. By chance, in the prosecution of that industry, mineral water was discovered far beneath the soil, which has proved of great value. There may be other and more valuable substances hidden in the soil; as to that, conjecture would be idle. But whatever that soil contains belongs to the state, and the state and it alone has the right to develop those hidden sources of wealth, if such there be, for the common benefit of all of its citizens.

With respect to plaintiff's claim to have the half acre of land assigned to her under the statute, as an oyster-planting ground, it may be observed, first, that this is no part of her common-law right, but is the creature of statute, of which she has not availed herself, and as to which she has no cause of action, if before availing herself of the right a subsequent statute defeats it. But if this be not so, she ought not to be permitted, capriciously and arbitrarily, to exercise that right and to locate the half acre in a manner most injurious to others, and not more beneficial to herself, so far as the facts in this case disclose. She should be required to exercise that right in the manner least injurious to others, if that end can be accomplished without a wrong to her.

The views which we have expressed are not in conflict with any case heretofore decided by this court. Where the nature of the title of the commonwealth has been considered, it has generally been in cases which involved the power of the state over the waters within it, with respect to the right of fishery, and language is used which implies absolute ownership and dominion. Of this class of cases, *McCready v. Commonwealth*, 27 Gratt. 985, is a fitting illustration. We shall not prolong this opinion by discussing each case in detail, but content ourselves with observing that the opinions are to be read and interpreted in the light of the facts under consideration. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493, ⁷⁷⁷ and *Waverly etc. Co. v. White*, 97 Va. 176, 33 S. E. 534, 45 L. R. A. 227, did not require a decision as to the nature of the commonwealth's title. She was no party to those suits, which involved the rights of riparian owners, inter se, and the manner in which those

rights should be apportioned, and the boundary lines between coterminous owners determined and established. In this case, for the first time, this court has been called upon to deal with the conflicting rights of the riparian proprietor and the commonwealth, and we have endeavored in the solution of the questions presented to apply that beneficent maxim of the civil law, "*Sic utere tuo ut alienum non laedas*," believing that, exercised in obedience to that benignant principle, every right of the parties to this controversy may be preserved and enjoyed.

In conclusion, we are of opinion that the plaintiff has no title as riparian owner to the water between low-water mark and the channel of the river, nor to the soil beneath it; that as riparian proprietor she has certain rights beyond low-water mark, as the right to build wharves and of access to the water and a right of way over it to the channel, and others perhaps which need not now be considered, including a right to locate a half acre of land as an oyster-planting ground, but that all these rights may be enjoyed by her to their fullest extent without let or hindrance, diminution or impairment, by reason of any right or privilege granted to and exercised by the Colonial Water Company, under the facts as disclosed in this record. We are, therefore, of opinion that there was no error in dismissing the plaintiff's bill, and the decree of the circuit court is affirmed.

The Submerged Lands of navigable waters within a state belong to it in trust for the use and benefit of the public: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905; *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257; *Mobile Trans. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143. This doctrine extends to the land between high and low water mark: *Allen v. Allen*, 19 R. I. 114, 61 Am. St. Rep. 738; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504; *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258. But see *Grey v. Mayor etc. of Patterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642. The state is powerless to divest itself of its title and trusteeship: *Prieve v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904. The title to land covered by navigable waters is the subject of a monographic note to *People v. Kirk*, 53 Am. St. Rep. 289-300; and water as a boundary line is the subject of a monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63.

Persons Owning Land fronting navigable waters are entitled, as against all but the sovereign as trustee for the people at large, to certain valuable privileges or easements: *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592; *McCarthy v. Murphy*, 119 Wis. 159, 100 Am. St. Rep. 876. The public right, however, is paramount: *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618; *Brooks v. Cedar Brook etc. Co.*, 82 Me. 17, 17 Am. St. Rep. 459; *Freeland v. Pennsylvania R. R. Co.*, 197 Pa. St. 529, 80 Am. St. Rep. 850. See, also, the note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SUTER v. WENATCHEE WATER POWER COMPANY.

[35 Wash. 1, 76 Pac. 298.]

LIMITATION OF ACTIONS—Contracts not in Writing—A statute of limitations for the commencement of actions upon a contract "or liability," express or implied, which is not in writing, refers only to contractual liabilities. (p. 883.)

LIMITATION OF ACTIONS—Trespass—Overflow of Lands—The negligent construction of an irrigating canal, lawfully built, but without sufficiently providing for carrying off surplus water, whereby the lands of another are overflowed, does not constitute a trespass, and an action for damages caused by such flooding is not within the statute limiting actions for "trespass upon real property." (p. 884.)

TRESPASS—Damages for Overflow of Land—Negligently allowing water to escape from a canal lawfully constructed, so as to overflow the land of another, creates a liability for consequential damages, recoverable in an action on the case, but not in an action of trespass. (p. 887.)

W. H. Thompson, L. C. Gilman, Danson & Huneke and B. J. Williams, for the appellant.

Dill & Crass, for the respondent.

* **HADLEY, J.** Respondents are husband and wife, and the appellant, a corporation, is the owner and operator of an irrigation canal with lateral connections, in Chelan county, Washington. The canal was constructed prior to 1899. It commences about five miles above the mouth of the Wenatchee river, follows along the bank of said river a distance of about four miles, and thence one branch extends in a northeasterly direction to a point near the Columbia river.

This suit was brought by respondents against appellant, and

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the complaint alleges that the said lateral canal was constructed about five feet wide and three feet deep, to the point last mentioned; that, from said point, appellant plowed a furrow across and around the lands of respondents, leading to the Columbia river, which furrow was about twelve inches in width and six inches in depth; that the furrow was not of sufficient capacity to carry away, and around the lands of respondents, the volume of water conveyed to said point as the terminus of the original canal. It is further alleged that the appellant carelessly and negligently constructed said canal by failing to supply the necessary waste gates and means for the escape of the surplus accumulation of water, before it arrived at respondents' land, and also failed to properly attend to the escape of such surplus accumulation; that on or about June 10, 1900, the appellant permitted the waste and surplus water, which naturally drained from the ³ country lying above said canal, to accumulate therein to such an extent as to fill it to its full capacity; that appellant permitted the water to flow along said original canal to its full capacity, to the point of its terminus aforesaid; that the aforesaid furrow, leading from said terminus, was wholly insufficient in capacity to receive and convey the water which had thus accumulated in the original canal; that, by reason of the insufficiency of said furrow for said purpose, the waters overflowed, washed and cut through the bank of the furrow and the end of the canal, and thence ran over and across the lands of respondents and down into the Columbia river; that thereby such deep and wide ditches were washed and cut in said land as damaged it to the extent of one thousand dollars, and recovery thereof is demanded.

Appellant demurred to the complaint on the ground that it appears upon the face thereof that the action was not commenced within the time prescribed by law. The demurrer was overruled, to which ruling appellant excepted. Appellant then answered, denying material allegations of the complaint, and, among other things, pleaded affirmatively that the acts complained of occurred more than two years prior to the commencement of the action, and that, if respondents ever had any cause of action whatsoever, on account of said acts, the same had been barred by the statute of limitations. A demurrer to said affirmative defense was sustained, and appellant excepted thereto. The cause was thereafter tried before the court and a jury, and a verdict was returned in favor of respondents in the sum of three hundred dollars. Appellant moved for a new

trial, which was denied. Judgment was entered for the amount of the verdict, and the defendant has appealed.

Respondents have moved to strike from the record appellant's exceptions to the court's instructions, on the ⁴ ground that they were neither included in the statement of facts, nor in any way certified by the trial court. A motion is also made to strike the statement of facts and certain affidavits sent up with the record. We think it unnecessary to discuss these motions, since we believe the case must be determined upon the demurrers heretofore mentioned.

It is assigned that the court erred in overruling the demurrer to the complaint, and in sustaining the demurrer to the affirmative answer, each of which rulings involved the statute of limitations. It will be remembered that the damages sought are alleged to have occurred on the 10th of June, 1900. This action was commenced more than two years thereafter. Unless the acts complained of come within some specific provision of the statute of limitations, the action must be governed by section 289a of Pierce's Code and section 4805 of Ballinger's Code, which limits the time for commencing the action to a period of two years after the cause of action shall have accrued.

Since the cause of action is not based upon a contract in writing, or liability, express or implied, arising out of a written contract, we must therefore refer to section 285 of Pierce's Code, and section 4800 of Ballinger's Code, to ascertain if any specific provision of the three year statute of limitations applies here. The action, not being founded upon contract, or liability arising therefrom, is not governed by subdivision 3 of said section, which provides as follows: "An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The term "liability," used in said subdivision, was evidently intended to refer to a contractual liability. Such, in effect, was the decision in *Sargent v. Tacoma*, 10 Wash. 212, 215, 38 Pac. 1048. The same statute was so construed by the United States circuit court, district of Washington, in *Aldrich v. Skinner*, 98 Fed. 375, and also in *Aldrich v. McClaine*, 98 Fed. 378. The last-named case was, on appeal to the United States circuit court of appeals, reversed: *Aldrich v. McClaine*, 106 Fed. 791, 45 C. C. A. 631. The reversal was, however, upon the ground that the liability involved was a contractual one, the lower court having held otherwise. The appellate court construed the

statute itself as did the lower court. For similar construction, see *McGaffin v. City of Cohoes*, 74 N. Y. 387, 30 Am. Rep. 307, and *Thomas v. Union Pacific R. Co.*, 1 Utah, 235.

If any part of the said three year statute applies here, it must be subdivision 1, which is as follows: "An action for waste or trespass upon real property." Respondents urge that the action is for trespass, and is, therefore, governed by the above-quoted subdivision. It is therefore necessary to determine whether the acts complained of constituted a trespass. The construction of the canal by appellant was for a lawful purpose, and it was, therefore, not an unlawful or wrongful act to permit water to flow through it. The complaint, however, charges negligence in the manner of construction, and in permitting an excessive amount of water to flow through the canal. The manner of construction was not in itself wrongful. Appellant had the lawful right to construct as it chose, and to permit the water to flow through the canal to its full capacity. These things were of no concern to respondents, unless they resulted in some injury to them. Such injury, so resulting, must necessarily have been consequential, and not the direct result of wrongful force applied to the respondents' lands, as must have been true, to create a trespass.

"It is not trespass to flow the lands of another with water by erecting a dam below his land, for anyone may * lawfully build a dam on his land, and the act, being injurious only in its consequences, is to be redressed by an action on the case": *Gould on Waters*, 3d ed., sec. 210.

In this state the distinctions between common-law actions are abolished, as far as relates to the procedure. We must, however, determine what the legislature meant when it referred to an action for "trespass upon real property." The same was true in *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189. There it was held that the erection of a bulkhead on one's own land, whereby the lands of another were flooded, was not a trespass, and hence that an action for damages caused by such flooding was not within the statute limiting actions for "trespass upon real property." The court observes as follows: "While in this state all distinctions between common-law actions are abolished as relating to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common-law actions, for the proper determination as to what the law-making power of this state had in mind when using the phrase, 'trespass upon real property.' It appears that the courts of

England often experienced difficulty in determining whether trespass or case was the true remedy to be pursued. This same difficulty often arises in this state, when the statute of limitations is invoked. But in the case at bar, weighed and tested by the rules of the common law, the distinction between these two forms of common-law actions is clearly apparent; and that this case upon its facts is one wherein it is sought to recover upon a liability not based upon an instrument of writing, and, therefore, barred in two years, we are satisfied. One of the best tests by which to distinguish trespass is found in the answer to the question, When was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass."

7 Then follows a discussion of authorities, showing the distinction between acts constituting trespass, for which redress was had through the common-law action of trespass, and those affecting only consequential results, damages for which were recoverable through an action on the case.

In Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470, the action was for the overflowing of the plaintiff's land, caused by the formation of a sand bank in a stream from the washing of sand through the defendant's ditch. It was held that the acts did not constitute trespass, and that the statute of limitations upon the subject of trespass to real property did not apply. The court said: "It is argued that trespass is a comprehensive term, which includes trespass on the case; and that this cause of action is a trespass on the case to real or personal property, which is embraced in the section under the term 'trespass.' It is true that 'trespass,' in one sense, means an injury or wrong; and, in that sense, it would include every cause of action, at least in tort. But trespass has, in the law, a well ascertained and fixed meaning. It refers to injuries which are immediate, and not consequential. It is clear that the word is used in that sense in section 2477. It would be a perversion of language to dominate an act, which produced a consequential injury to real or personal property, a trespass. It would be a perversion alike of the legal and common acceptance of the words."

In Holly v. Boston Gaslight Co., 8 Gray, 123, 69 Am. Dec. 233, the action was for damages arising from negligence in suffering gaspipes to be and remain out of repair. The court declared that the act complained of was not trespass, and ob-

served as follows: "The defendants lawfully laid down their pipes in the public street, and filled them with gas. If they failed to discharge their duty in regard to its distribution, and negligently suffered it to escape, they were liable therefor ⁸ to other parties for all consequential damages, and might be proceeded against for the recovery of compensation, in an action in the nature of an action on the case, but not as trespassers, in an action of trespass." The same distinctions are observed in *Cooper v. Hall*, 5 Ohio, 321, and *Daneri v. Southern Cal. Ry. Co.*, 122 Cal. 507, 55 Pac. 243.

Respondents cite cases involving trespasses committed by animals, as analogous to the principle under examination here. Such were, however, expressly held to constitute trespass at common law. Every unwarrantable entry by a person or his cattle on the land of another was a trespass. The act of the animal was classified as though it were the act of the owner. The injury was the direct and immediate result of the wrongful force, and was not consequential. Consequential damages, resulting from such acts as are complained of in the case at bar, were, however, recoverable in an action on the case only, and not in an action for trespass.

We must, therefore, conclude that, when our law-makers provided a three year limitation for actions for "trespass upon real property," they meant to include only such recovery as could have been had through the action of trespass at common law. It follows that actions under our present procedure, through which relief is sought for injuries to land, and which could have been had at common law through an action on the case only, are governed by our two year statute of limitations, hereinbefore cited.

Respondents argue in their brief that appellant's act was a forcible one, in that they assert it let the waters into the canal through the headgate, and that the injury to their lands was the immediate result of such forcible act. It is asserted that the water was under appellant's absolute control from the time it entered into its ⁹ canal from the Wenatchee river until it was let out at the end of the lateral. Such is, however, not the case alleged in the complaint. The complaint is based upon the negligence in the construction of the canal, and upon its insufficiency to carry the surplus water which accumulated, at the time mentioned, by drainage from above. If such were true, it is manifest that the water was not under the immediate and absolute control of appellant, as respondents now argue.

The theory of the complaint is that the injury resulted from negligent construction, which occurred long before, and whereby appellant failed to properly handle the waste and surplus water. The act was remote from the injury. The latter was purely consequential, and not the direct or immediate result of the former.

* Moreover, if respondents' present argument were supported by the allegations and theory of the complaint, then, even though appellant had full control of the water, it still follows, from the reasoning in the cases cited above, that it was not doing a thing unlawful in itself when it permitted the water to run through its canal; and if, after running through the canal, it was negligently permitted to escape, the appellant was liable for consequential damages, recoverable at common law in an action on the case only, and not in an action of trespass. We therefore think that, under the cause of action stated in the complaint, our statute of limitations barred the action after two years. It follows that the court erred in overruling the demurrer to the complaint.

The judgment is therefore, reversed and the cause remanded, with instructions to the lower court to set aside the verdict and to sustain the demurrer to the complaint.

Fullerton, C. J., and Mount, Anders, and Dunbar, JJ., concur.

An Injury is a Trespass only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of: *Holly v. Boston Gas Light Co.*, 8 Gray, 123, 69 Am. Dec. 233. The overflowing of another's land has been regarded as not a trespass within this rule: *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Perrine v. Bergen*, 14 N. J. L. 355, 27 Am. Dec. 63. As to the duty of canal and ditch owners in conducting water to prevent its escape to the injury of others, see *Big Goose etc. Ditch Co. v. Morrow*, 8 Wyo. 537, 80 Am. St. Rep. 955; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784.

A Limitation Provision in a city charter that "no action against the city on a contract, obligation, or liability, express or implied, shall be commenced except in one year after the cause of action shall have accrued," does not include actions for torts: *McGaffin v. Cohoes*, 74 N. Y. 387, 30 Am. Rep. 307.

NATHAN v. SPOKANE COUNTY.

[35 Wash. 26, 76 Pac. 521.]

CONSTITUTIONAL LAW—Taxation.—The expediency of legislative enactments for the listing, assessment, levy, enforcement, and collection of taxes, within the limitations prescribed by the constitution, is within the discretion of the legislature, and constitutes a subject matter with which the courts will not intermeddle. (p. 891.)

CONSTITUTIONAL LAW—Taxation of "Migratory Stock."—A statute imposing a tax upon goods brought into the state after the time for assessing property, to be sold in a place of business, temporarily occupied, is not unconstitutional on account of making distinctions as to the manner of the assessment and collection of taxes levied against the different kinds of personal property. (p. 892.)

TAXATION.—Property otherwise taxable within the state is not exempt from taxation because it may have been returned for taxation for the same year in another state. (p. 892.)

CONSTITUTIONAL LAW—Taxation—Due Process of Law—Hearing Before Assessor.—Under a statute providing for the taxation of goods brought into the state after the time for assessing property, and that the owner or person in charge of such property shall immediately notify the assessor who shall then proceed to value the goods at their true value, upon which valuation the taxes for the then current year shall be assessed and collected, the person liable for such tax having an opportunity to submit evidence to the assessor, and to be heard with regard to the valuation of such property, the assessor acts in a judicial capacity, and the statute does not deprive a person of his property without due process of law, in that it fails to provide for a hearing in behalf of an aggrieved person whose property is sought to be charged with the tax. (p. 893.)

CONSTITUTIONAL LAW—Taxation—Immunities.—A provision in a "migratory stock tax" statute that the person paying such tax shall be allowed certain reductions from the next regular assessment of such property is unconstitutional and void as granting to such person an exemption or immunity which is denied to other like property owners of the same class, whose property is first listed for the next regular assessment. (p. 895.)

CONSTITUTIONAL LAW—Taxation—Statute Void in Part.—The fact that one provision of a tax statute is unconstitutional does not affect the validity of the remaining portions of such statute, providing they are distinct, separable, and complete in themselves. (pp. 896, 897.)

Robertson, Miller & Rosenhaupt, for the appellant.

H. Kimball and M. Poindexter, for the respondents.

25 PER CURIAM. This is an action instituted in the superior court of Spokane county by A. E. Nathan, appellant and plaintiff below, against Spokane county, George Mudgett as county treasurer, and A. P. Williams, county assessor of such

county, defendants and respondents. The object of the suit is to enjoin the collection of seven hundred and fifty dollars levied as taxes upon plaintiff's property for the year 1901. The court below sustained a general demurrer to the complaint. The plaintiff elected to stand on his complaint. The action was thereupon dismissed, and an appeal taken to this court.

The assignments of error present but the one question—whether the complaint states sufficient facts to entitle appellant to relief. His brief in this court contains the following statement: "The action was presented in the court below, and is presented now to this court, to determine the constitutionality of section 12 of the Session Laws of 1899, page 295." The transcript discloses that appellant, in order to prevent distraint of his goods and merchandise, deposited ²⁰ seven hundred and fifty dollars in the hands of the county treasurer, which, by stipulation, stands in lieu of a levy, if the appellant shall be adjudged to pay the tax. The complaint, among other things, alleges that on or about the tenth day of November, 1901, appellant, A. E. Nathan, brought a stock of goods and merchandise from the state of Montana to the city and county of Spokane; that the value placed on such stock by appellant was eight thousand dollars; that appellant, immediately upon his arrival in Spokane, commenced doing business as a merchant, under the style of A. E. Nathan & Co., and proceeded, in the regular and ordinary course of business, to dispose of his merchandise at a place of business in said city temporarily used for that purpose, without the intention, on the part of appellant, of permanently engaging in trade at such place; that on or about the twelfth day of November, 1901, respondent A. P. Williams, the county assessor of Spokane county, by himself and deputies, came into the store of appellant and notified him that he (the assessor) would forthwith proceed to assess such stock of goods; that appellant then and there offered to show to said assessor the value of such stock, and that the same had been assessed, and taxes paid thereon, in Montana for the then current year (1901); that such assessor proceeded to assess such merchandise, and on the twelfth day of November, 1901, the county treasurer, George Mudgett, came to appellant's said place of business and threatened to distrain appellant's goods, unless such tax were paid; that, in order to prevent such levy, appellant, under protest, deposited the sum of seven hundred and fifty dollars in the hands of said Mudgett, not as county treasurer, but as a private individual, pending the final deter-

mination of this controversy, and that this has been done with the consent of the prosecuting attorney of Spokane county.

³⁰ The complaint further alleges that the above statute, under which this tax levy was made, is unconstitutional for the following reasons: 1. The said enactment provides a different mode and manner of the assessment levied against the property of appellant than is provided for other persons and property similarly situated; 2. That there is no provision made for any board of equalization, or other person, to hear and determine the matter as to the justness of such tax, and the value of the property sought to be assessed; 3. That it provides for a rebate to persons residing permanently in this state, and is a discrimination against persons temporarily residing therein; 4. That this law is special in its character, and unequal in its application.

The provisions of the statute attacked by appellant are as follows: "Whenever any person, firm or corporation shall, subsequent to the first day of March of any year, bring or send into any county any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade in such place, the owner, consignee or person in charge of the said goods or merchandise shall immediately notify the county assessor, and thereupon the assessor shall at once proceed to value the said stock of goods and merchandise at its true value, and upon such valuation the said owner, consignee or person in charge shall pay to the collector of taxes a tax at the rate assessed for state, county and local purposes in the taxing district in the year then current. And it shall not be lawful to sell or dispose of any such goods or merchandise as aforesaid in such taxing district until the assessor shall have been so notified as aforesaid and the tax assessed thereon paid to the collector. Every person, firm or corporation bringing into any county of this state goods or merchandise after the first day of March shall be deemed subject to the provisions of this section; provided, ³¹ that all persons having paid the tax as herein provided for, shall at the time of the regular assessment next succeeding said payment, be allowed by the county assessor in making his assessment a deduction in a sum equal to that part of the entire assessment of the previous year as the number of days of the previous assessment year he was not in such county bears to the whole of such assessment year": Laws 1899, p. 295, sec. 12; Pierce's Code, sec. 8679; 3 Ballinger's Code, sec. 1740a.

Article 7, section 1 of the constitution of the state of Washington provides: "All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." The object and intent of the framers of the constitution was, that all property not exempt by virtue of the provisions of such instrument should bear a tax in proportion to its value; that the listing, assessment, levy, enforcement and collection of taxes, subject to certain limitations unnecessary to notice in this connection, should be in the discretion of the legislature. The expediency of such enactments, within the limitations prescribed by this constitution, constitutes a subject matter with which the courts will not intermeddle. The legislature is a branch of our state government co-ordinate with the executive and judicial. Each department is supreme within its proper sphere. The law-making power is vested in the legislature, under the provisions of our fundamental law.

Judge Cooley, in his able treatise on Constitutional Limitations, fifth edition, page 593, uses the following pertinent language: "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; ³² to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property."

Again, at page 645 of the same treatise, the learned jurist observes: "What method shall be devised for the collection of a tax the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the state may have imposed. Very summary methods are sanctioned by practice and precedent."

This court, in the case of Johnston v. Whatcom County, 27 Wash. 95, 67 Pac. 569, construed the above statutory provision as applying to persons, firms or corporations bringing their goods and merchandise into this state from beyond its boundaries, after the first day of March, to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade at such place; holding that it did not apply to merchants moving their goods from one county into another within the state, after the first day of March, when such goods had already been listed and

assessed for taxes in the county of the situs of the property at that date for the then current year. It is true that the constitutionality of this statute was not considered in the above case; but the contention of appellant—that this enactment is unconstitutional because it “provides a different mode and manner of the assessment levied against the property of this appellant, than is provided for other persons and other property similarly situated”—is met by the decision of this court in *Wright v. Stinson*, 16 Wash. 368, 47 Pac. 761. We held in that case, that the “migratory stock act” (Laws 1895, p. 105) was not unconstitutional, on account of making distinctions as to the manner³³ of assessment and collection of taxes levied against the different kinds of personal property.

The case of *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593, 39 L. R. A. 594, was, in many of its features, similar to the case at bar. The court held that the provision of the state constitution of Wyoming, requiring property to be uniformly assessed for taxation, does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same; that there is uniformity in the assessment, if the same basis of valuation is taken as to all property of like character; that, as long as the rate and method of valuation are the same as in case of other property, a statute may be enacted affecting the taxation of a peculiar class of property, to guard against its escape therefrom, without violating any constitutional provision. This case is also authority on the proposition presented in this controversy that, where personal property is otherwise taxable in the state of Washington, it is not exempt from taxation because it may have been returned for taxation for the same year in another state: See, also, *Cooley on Taxation*, 2d ed., 37, 219-221; *Coe v. Errol*, 116 U. S. 517, 524, 6 Sup. Ct. Rep. 475, 29 L. ed. 715; exhaustive note, 62 Am. St. Rep. 448.

The appellant in his complaint alleges that the tax in question was assessed and levied against his property after the time fixed by law for the equalization of taxes by the county board, and therefore the proceedings had in that behalf were invalid, because he had no opportunity, under the provisions of this statute, to have the valuation of his goods, as determined by the county assessor for the purposes of taxation, reviewed in any manner; that the law in question is also unconstitutional in this: it fails to³⁴ provide for the giving of notice to the owner

of the property before the assessment and levy of the tax. In the case of *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593, 39 L. R. A. 594, it would seem, from the opinion of the court that the party assessed under the provisions of the Wyoming statute, before or after the annual levy, and feeling himself aggrieved, may subsequently appear before the county board, at either a regular or special session, and obtain relief.

The authorities cited by appellant's counsel, on the proposition that a statute authorizing a board of equalization to raise the valuation of the property of an individual taxpayer, listed by him for taxation, without providing for notice to him of the proposed increase in his assessment, is unconstitutional and void, are not applicable to the questions under consideration. This statute provides that the owner, consignee or person in charge of the goods or merchandise, shall immediately notify the county assessor, who shall thereupon proceed to value the same at their true value, upon which valuation the taxes for the then current year shall be assessed and collected. The party liable to the payment of the tax has the opportunity to submit evidence to the assessor, and to be heard with regard to the valuation of such property. It is presumed that the assessor, being a sworn officer, will do his duty under the law, and that he will not act unfairly and arbitrarily regarding the assessment of property for the purposes of taxation. In *Hagar v. Reclamation District etc.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569, the court held that the duties of assessors, in determining the value of property for the purposes of general taxation, are judicial in their nature. Thus, in the case at bar, respondent Williams, the county assessor, acted in a judicial capacity in placing the valuation upon appellant's goods for such purposes. Assessors are usually classified as ³⁵ officials performing both ministerial and judicial functions. We are therefore of the opinion that this statute does not deprive a party of his property without due process of law, as urged by appellant, in that it fails to provide for a hearing in behalf of an aggrieved party whose property is sought to be charged with the tax: *Hagar v. Reclamation District etc.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569.

The question as to what remedies may be open to a taxpayer under this law, in case of an illegal assessment or overvaluation of his property, is not properly before us on this appeal. The present inquiry, on the face of the record, by the stipulation of the parties to this controversy, is limited to the single proposi-

tion regarding the constitutionality of the above statutory provisions. Inasmuch as this law provides that the party charged with the tax has an opportunity to submit his proofs and make his showing to the assessor, in the matter of assessing his property for taxation, we are not justified in concluding that such party is deprived of his property "without due process of law," because he is, by the express terms of the revenue law, given no opportunity to have the assessment reviewed by a board of equalization, or otherwise. Undoubtedly in case the assessor should act arbitrarily, unfairly, or fraudulently in the performance of his duties under this statute, the aggrieved party might, if he saw fit, invoke the common-law remedies in the courts to redress the wrongs which he suffers in consequence of such official misfeasance or malfeasance. Moreover, the code provides that, "A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common ³⁸ law, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy at law": Laws 1895, p. 115, sec. 4; Pierce's Code, sec. 1396; Ballinger's Code, sec. 5741.

This court, in *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143, held that the above provisions applied to a county treasurer exercising judicial functions, where "there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." We see no reason why this remedy may not be invoked in a proper case regarding the acts of a county assessor, or other official exercising judicial functions. Under the provisions of chapter 59 of Pierce's Code, the court issuing the writ is vested with ample powers to inquire into the merits of the controversy and "give judgment, either affirming or annulling or modifying the proceedings below": See, further, *Lewis v. Bishop*, 19 Wash. 312, 53 Pac. 165, and authorities cited.

Coming now to the consideration of the constitutionality of the proviso contained in the above statute, we think that the legislature was without power or authority to enact any law providing that, after the payment of such taxes, the person paying them should be allowed certain deductions from the next regular assessment of such property. Article 1, section 12, of the state

constitution provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." This law, by the terms of the proviso, not only discriminates between taxpayers of the same class, but grants privileges and immunities to taxpayers who own or possess property at the time of the next regular assessment, which are withheld from and denied to parties similarly situated, who may ³⁷ have paid their taxes levied pursuant to the above statute, and who cease to own or have property on the tax-rolls at the time of the next regular assessment. Again, this provision discriminates between taxpayers whose property is listed on rolls of the next regular assessment, after the itinerant shall have paid his tax. He is granted exemptions in the latter instance which are denied to other property owners or taxpayers of the same class, whose property is listed for the regular assessment named in such proviso. The legislature cannot grant such exemptions or immunities directly; neither can it accomplish the same object by indirection: Cooley's Constitutional Limitations, 5th ed., *391.

Absolute equality in matters of taxation is an impossibility. An eminent jurist, the late Mr. Justice Miller, of the supreme court of the United States, in one of his opinions, remarked that such a condition was an "unrealized dream." Moreover, we think that this proviso is repugnant to the purview of the section to which it is appended. This section was evidently enacted for the purpose of reaching a certain class of property that was liable to escape taxation, unless special measures and remedies were provided for the assessment and collection of the tax. While it was competent for the legislature to enact such a law, it was not competent for it to tack on a further provision, allowing a commutation or abatement of the tax, or any portion thereof, either directly or indirectly. The logic of this conclusion is made the more apparent when we read the proviso in the light of the enactments found in our state constitution, above noted. It is provided in our organic law that all property, unless legally exempt, "shall be taxed in proportion to its value to be ascertained as provided by law." It is significant in this connection that there are no exemptions mentioned or provided for in our fundamental law, authorizing the ³⁸ legislature to make any deductions from the amount of any tax, after it shall have been assessed, levied and collected pursuant to law. See, also, article 11, section 9, state constitution,

which provides that: "No county, nor the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatever." True, this provision only relates to the discharge or release of state taxes. Still, if this proviso were allowed to stand, it would have the indirect effect to authorize and permit a release, *pro tanto*, of the state's revenue.

We are fully aware of the rule of law enunciated by some authors, as well as by courts of high repute, that "a saving clause which is repugnant to the enacting part of a statute is void; but a proviso which is repugnant to the purview of the act will override and control the latter": Black on Interpretation of Laws, 278. This same learned author, on the next page, says that the distinction drawn between saving clauses and provisos has been much criticised. The following language of Chancellor Kent in volume 1 of his Commentaries, page 463, is quoted by Mr. Black with approval: "There is a distinction in some of the books between a saving clause and a proviso in the statute; though the reason of the distinction is not very apparent. . . . It may be remarked that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause, and it is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected."

Be this rule of construction as it may, the foregoing distinction is without significance, as applied to the facts ²⁹ in the action at bar, since we have reached the conclusion that the proviso of the above statute is void on constitutional grounds, and must therefore be rejected. Eliminating the proviso from the above section 12 of the act of 1895, such enactment seems to be complete in itself, fully authorizing the assessment, levy and collection of the tax in question: *Seanor v. County Commrs.*, 13 Wash. 48, 42 Pac. 552. Judge Cooley, in his work on Constitutional Limitations, fifth edition, page *178, uses the following language: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have

passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall."

Testing appellant's complaint in the light of the foregoing propositions of law, we are of the opinion that it fails to state a cause of action against respondents, or either of them, and that there is no error in the record of which appellant has any legal ground for complaint.

The judgment of the superior court is therefore affirmed.

The Taxation of Migratory Livestock is discussed in *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 9 Wyo. 352, 87 Am. St. Rep. 959; monographic note to *Buck v. Miller*, 62 Am. St. Rep. 465.

Property is not Exempt from Taxation because returned for assessment and taxation for the same year in another state: *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 905.

A Statute Void in Part may be valid as to the residue: *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397.

STATE v. FAIR.

[35 Wash. 127, 76 Pac. 731.]

CONSTITUTIONAL LAW—Special Legislative Sessions.—If the state constitution empowers the governor to call extra sessions of the legislature and defines his duty respecting them, but does not authorize him to restrict or prohibit legislative action at such sessions by proclamation or otherwise, the legislature, under a call for an extra session for a particular purpose, is not restricted to passing laws for such purpose, but may legally pass other laws not germane thereto. (p. 901.)

ROBBERY—Variance Between Pleading and Proof.—If an indictment for robbery charges that the money taken was the property of a certain named individual, proof that it belonged to a partnership of which he was a member and that it was in his immediate and exclusive control does not constitute a fatal variance. (p. 902.)

TRIAL—Verdict—Sufficiency of Evidence.—A verdict upon conflicting evidence will not be disturbed on appeal when there is testimony, which, if true, is sufficient to justify and support it. (pp. 903, 904.)

APPEAL—Parties.—Witnesses for the defense in a criminal case whose fees are not allowed by the trial court, are not parties to the action and cannot appeal from such action of the lower court. (p. 904.)

Robertson, Miller & Rosenhaupt, for the appellants.

H. Kimball and R. M. Barnhart, for the respondent.

¹²⁸ ANDERS, J. On and prior to the night of Saturday, April 4, 1903, Robert G. Miller and his brother, under the firm name of Miller Brothers, were conducting a meat market on East Sprague avenue, in the city of Spokane. About 9 o'clock on the evening of that date, and while Robert G. Miller and Charles Johnson, the driver of the market wagon, were preparing to close the market for the night, three masked men, with pistols in their hands, suddenly entered the room, "held up" Miller and Johnson, and took from the cash register—which was on the corner of the counter—and carried away, seventy dollars belonging to said Robert G. Miller and his brother. At the time of the robbery, the market and its contents, including the cash register and the money therein, were in the care and possession of said Robert G. Miller.

Some time in June following, Frank Fair and Sam Eder were arrested and identified as being two of the ¹²⁹ persons who committed the offense. The third and unknown man, the one who rifled the cash register, has never been apprehended or discovered. Subsequently to the arrest of Fair and Eder, the prosecuting attorney filed an information against them in the superior court for Spokane county, the charging part of which is as follows: "That the said defendants, Frank Fair and Sam Eder, on the fourth day of April, 1903, in the county of Spokane, and state of Washington, then and there being, did then and there willfully, unlawfully, feloniously and forcibly take from the immediate presence of Robert G. Miller, and against his will, a certain article of value, to wit, seventy dollars in money of the value of seventy dollars, the property of and belonging to Robert G. Miller, by then and there willfully, unlawfully and feloniously pointing at said Robert G. Miller a loaded revolver, thereby putting said Robert G. Miller in fear."

At his own request the defendant Fair was tried separately, and at the trial he set up an alibi, viz., that at the time of the robbery he was at the town of Prosser, Washington, which, according to the evidence, is about one hundred and eighty-six miles distant from the city of Spokane. To establish this defense the defendant testified, and procured several witnesses who also testified that he was at Prosser at the time the robbery with which he was charged was committed. The jury, however, found the defendant guilty

as charged, and the court, after denying a motion in arrest of judgment, and also a motion for a new trial, sentenced the defendant to imprisonment in the penitentiary for the term of fifteen years. To reverse this judgment and sentence the defendant has appealed.

Section 829 of the Code of Washington, commonly known as the Code of 1881 (Ballinger's Code, sec. 7103), defined the crime of robbery, and provided that every person convicted of that offense should be punished by imprisonment ¹³⁰ in the penitentiary not less than one nor more than twenty years. This section of the statute was amended by an act of the legislature, approved February 5, 1903, which changed the minimum imprisonment for the offense from one to five years: Laws 1903, p. 5. This amendatory statute, not carrying an emergency clause, did not take effect until after the commission of the crime with which appellant is charged. Neither did it contain a saving clause as to pending prosecutions, or as to offenses committed under the old statute. In 1901, however, the legislature, at an extraordinary session, passed a general act saving prosecutions in cases of the repeal or amendment of criminal statutes: Ex. Sess. Laws 1901, p. 13.

The trial of the appellant occurred on July 17, 1903, which was after the amending statute of the 5th of February became effective. And it is contended by the learned counsel for appellant that, at the time of the trial, there was no law in existence defining the crime of robbery, or prescribing the punishment therefor, and that the trial court erred in holding the contrary. This contention is based upon the motion that the general act above mentioned, of June 13, 1901, is invalid for the reason that the legislature had not the power to pass it at that extraordinary session. Section 7 of article 3 of the state constitution, relating to the powers of the governor, provides as follows: "He may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened." By virtue of the power thus vested in him by the constitution, Governor Rogers convened the legislature in extraordinary session on June 11, 1901, and the purpose for which it was so convened was stated in his proclamation as follows: ¹³¹ "The purpose for which the legislature is called together is that it may pass upon, confirm or amend the law relating to capital punishment."

It was the exclusive province of the governor, under the constitution, to determine whether an occasion existed of sufficient

gravity to require an extra session of the legislature, and his conclusion in that regard is not subject to review by the courts: *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464. That such is the law is not disputed by counsel for appellant, but they do earnestly insist that the legislature, at its extra session, had no right to legislate upon any subject not mentioned in the governor's proclamation. And, if this position is well taken, it necessarily follows that the general saving statute above mentioned is void, and constituted no authority whatever for the prosecution and punishment of appellant. The solution of this question depends upon the effect of the constitution on the power of the legislature at its extra session.

It seems to be assumed on behalf of the appellant that the provision of the constitution above quoted restricted legislative action to matters specifically designated by the governor in his proclamation, and the following authorities are cited in support of this proposition: *Sutherland on Statutory Construction*, sec. 26; *Davidson v. Moorman*, 2 Heisk. 575; *Jones v. Theall*, 3 Nev. 233; *Wells v. Missouri Pac. Ry. Co.*, 110 Mo. 286, 19 S. W. 530; *In re Governor's Proclamation*, 19 Colo. 333, 35 Pac. 530. It is true, it was held in each of those cases that the particular statute or act in question was void because the legislature was inhibited by the express terms of the constitution from passing it. For instance, the constitutional provision involved in the Nevada case was the following: ¹²² "The governor may, on extraordinary occasions, convene the legislature by proclamation, and shall state to both Houses, when organized, the purpose for which they have been convened, and the legislature shall transact no legislative business except that for which they were specially convened, or such other legislative business as the governor may call to the attention of the legislature while in session."

The decisions in the other case cited were based upon constitutional provisions substantially like that of Nevada, and their soundness can hardly be doubted. The rule announced by them, as to the power of the legislature when assembled in extraordinary session, is tersely and correctly stated by *Sutherland* in his work on *Statutory Construction* at section 26 (cited by appellant), as follows: "When convened in extra session and limited by the constitution to business for which the session was specially called, all acts passed relating to other subjects will be void."

But inasmuch as our constitution does not restrict the legislature, at its extra sessions to the consideration of the particular business for which it was convened, or to such other matter as may be called to its attention, while in session, by the governor, it would seem that the authorities relied on by appellant are not applicable to the case at bar. All legislative power is declared by the state constitution to be vested in a Senate and House of Representatives, or, in other words, in the "legislature of the state of Washington": Const., art. 2, sec. 1. But such powers are not specially defined by the constitution, nor are they, strictly speaking, granted by that instrument. "The people in framing the constitution committed to the legislature the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular ^{law} power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden": *People v. Draper*, 15 N. Y. 532, 543.

It is stated in a recent legal publication that "the legislature of a state has power to enact any laws that are not expressly or by necessary implication prohibited, either by the federal constitution or by the constitution of the state enacting the law, the constitutionality of which is called in question": 8 Cyc. 806. Many cases are cited which hold the doctrine thus announced, and none has been cited by counsel or discovered by us announcing a different rule. The question of the extent of legislative power is fully and intelligently discussed in *Kimball v. Grantsville City*, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628, *State ex rel. Nichols v. Cherry*, 22 Utah, 1, 60 Pac. 1103, and *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. See, also, *Cooley's Constitutional Limitations*, 6th ed., p. 197.

The legislature was lawfully convened by the governor, and not being limited by the constitution to the consideration of the legislative business for which it was called together, we think it had ample power and authority to enact the general saving statute of June 13, 1901, and it therefore follows that that act is constitutional and valid. While the constitution empowers the governor to call extra sessions of the legislature, and defines his duty respecting the same, it does not authorize him to restrict or prohibit legislative action by proclamation or otherwise: *Morford v. Unger*, 8 Iowa, 82; *Farrelly v. Cole*, 60 Kan.

356, 56 Pac. 492, 44 L. R. A. 464; Cooley's Constitutional Limitations, 6th ed., p. 197.

It is insisted on the part of the appellant that there was a variance between the pleading and the proof in ¹³⁴ regard to the ownership of the property designated in the information. It will be observed that the information alleged that the money taken was the property of Robert G. Miller. The evidence showed, however, that it really belonged to a copartnership of which said Robert G. Miller was a member, but that at the time of the robbery it was in his presence, and under his immediate and exclusive control. Was this proof sufficient to sustain the allegation of the ownership of the property described in the information? We have no doubt that it was. Our statute (Ballinger's Code, sec. 6944; Pierce's Code, sec. 2016) provides: "In the prosecution of any offense committed upon, or relative to, or in any way affecting any real estate, or any offense committed in stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any money, goods or other personal estate, it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial that, at the time when such offense was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof." Robbery is a compound or aggravated larceny, and larceny is only another name for stealing or theft. And, says Mr. Bishop: "The indictment for robbery charges a larceny, together with the aggravating matter which makes it, in the particular instance, robbery. For example, the property is described the same as in larceny; the ownership is in the same way set out, and so of the rest": 2 Bishop's New Criminal Law, sec. 1159.

Although robbery is not specifically mentioned in the statute last quoted, we think it is clearly within its spirit, and that that section of the code is therefore applicable ¹³⁵ to the case at bar. Under this statute this court has held that, if the actual or constructive possession of a building is in the person alleged in an information for arson to be the owner, it is no variance if it be proved on the trial that he was in such possession at the time of the commission of the offense, although the actual ownership be shown to be in another: *State v. Biles*, 6 Wash. 186, 33 Pac. 347. And we see no reason why the same rule should not be applied in this case.

In *People v. Clark*, 106 Cal. 32, 39 Pac. 53, the information charged the defendant with having robbed the Wing Hing Company of two hundred and ten dollars. The evidence showed that sum was taken, but that only one hundred and seventy-five dollars belonged to the company. And upon the question whether there was a variance between the allegation and proof of ownership, the supreme court of the state said: "The court properly refused to instruct the jury that such variance entitled the defendant to an acquittal; nor did the court err in charging the jury that it was not necessary that the property alleged to have been taken was, in its entirety, the property of that company." That case would seem to be directly in point here: See, also, *State v. Adams*, 58 Kan. 365, 49 Pac. 81; *Brooks v. People*, 49 N. Y. 436, 10 Am. Rep. 398.

It is claimed by appellant that the court erred in refusing to grant a new trial on the ground that the evidence is not sufficient to justify the verdict of the jury. We have carefully examined and considered all the evidence in the record, and we are not convinced that it was not sufficient to warrant the jury in returning a verdict of guilty. That a robbery was committed at the time and place designated in the information, there can be no reasonable doubt. The prosecuting witness, Miller, and Charles Johnson testified that the appellant was one of the ¹³⁶ persons who committed the offense; and Detective McDermott, who had known the appellant for several years, testified that he saw him in Spokane at 8 o'clock in the evening of the robbery. This evidence on the part of the state was contradicted by appellant, who, as a witness in his own behalf, testified that he was not in the butcher-shop of Miller Brothers, or in Spokane, at the time of the robbery, but was then in Prosser, nearly two hundred miles from the scene of the robbery. Four other witnesses were introduced by the defense, each of whom testified to the same effect. But it was the exclusive province of the jury to weigh the evidence, and, in so doing, to determine the credibility of the various witnesses. And it is evident that the jury concluded that the witnesses for the defense were not entitled to credit, and that those for the prosecution spoke the truth. Moreover, the trial judge must have been of the same opinion, for he passed upon the sufficiency of the evidence in determining the motion for a new trial. And, under such circumstances, this court will not disturb the verdict of the jury where there is testimony which, if true, is sufficient to justify it: *State v. Kroenert*, 13

Wash. 644, 43 Pac. 876; *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489; *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036.

We perceive no error in the record, and the judgment as to appellant Frank Fair is therefore affirmed.

The witnesses for the defendant and appellant Fair, viz., Frank Rutledge, O. Johnson, G. L. Eichenhauer, and J. H. Bailey, have appealed from the order of the trial court disallowing their fees for attendance on the trial, and for mileage, as certified by the clerk. The respondent moves to dismiss this pretended appeal for the reasons, among others, that none of said persons was ¹⁸⁷ a party to this action in the trial court; that said persons are not proper parties appellant herein, and that this court has no jurisdiction of the subject matter of the attempted and pretended appeal of said persons. This motion must be granted. Our statutes provide that "any party aggrieved may appeal to the supreme court in the mode prescribed in this title" (Laws 1901, p. 28); that "any party aggrieved by the taxation of costs by the clerk of the court may, upon application, have the same retaxed by the court in which the action or proceeding is had" (Ballinger's Code, sec. 5185; Pierce's Code, sec. 1122); and that "the party commencing the action shall be known as the plaintiff, and the opposite party the defendant": Ballinger's Code, sec. 4794; Pierce's Code, sec. 251. As these so-called appellants were not parties to the action at any stage of the proceeding, it seems clear to our minds that they were not authorized by law to prosecute an appeal from any order or judgment made or rendered by the court therein. They were simply witnesses at the trial of the cause, and were therefore in no sense parties to the action, or to the ruling of the court rejecting their claim for witness fees: *Fiedel-day v. Diserens*, 26 Ohio St. 312; *Perkins v. Delta etc. Co.*, 66 Miss. 378, 6 South. 210. See, also, *Nicol v. Skagit Boom Co.*, 12 Wash. 230, 40 Pac. 984, and *Montgomery v. Leavenworth*, 2 Cal. 57.

For the foregoing reasons the appeal of Rutledge, Johnson, Eichenhauer and Bailey is dismissed.

Fullerton, C. J., and Mount, Dunbar, and Hadley, JJ., concur.

The Legislature may enact any law at a special session called by the governor, it seems, that it might at a regular session, if not restricted by some constitutional provision. Since its powers are not derived

from the governor's proclamation, it is not confined in its enactments to the special purposes for which it was convened by the executive: *Morford v. Unger*, 8 Iowa, 82.

The Ownership of Property Stolen from a partnership is sufficiently laid in one of the members of the firm: *Smith v. State*, 183 Ala. 145. 91 Am. St. Rep. 21.

MONROE MILL COMPANY v. MENZEL.

[35 Wash. 487, 77 Pac. 813.]

PLEADINGS—Inconsistency—Evidence.—An allegation in a complaint that a stream is navigable for shingle bolts is not negated by a subsequent averment that plaintiff had constructed a dam to furnish a sufficient supply of water in such stream to conveniently and rapidly float shingle bolts and other timber. Evidence is admissible to support such a complaint. (p. 907.)

NAVIGABLE STREAMS—Riparian Rights—Estoppel.—If a person has cleared a navigable stream across the land of another of obstructions in order to facilitate the movement of floating lumber, the facts that such land owner has acquiesced therein for two years without objection, has actually assisted in cleaning out such obstructions, thereafter used the benefit accruing therefrom, and has also used the flow of the water as furnished by such improvements, do not estop him from claiming an interference with the natural flow of the water. (pp. 907, 908.)

NAVIGABLE STREAMS—What are.—A stream which in its natural state can be practically used for the floatage of shingle bolts to market at certain times and seasons annually is a navigable stream, which may be used for such purpose across the lands of a lower riparian proprietor and any interference with such use may be enjoined. (p. 909.)

NAVIGABLE STREAMS—Riparian Rights—Detention and Release of Water Overflow—Injunction.—Maintaining a dam in, and detaining the water of, a navigable stream, and the release of such water at irregular intervals, causing an overflow of the lands of a lower owner, and obstructing his navigation of the stream, are such interferences with the natural flow of the water as entitle such lower proprietor to an injunction against the maintenance of such dam. (pp. 910, 911.)

NAVIGABLE STREAMS—Riparian Rights—Unmeandered Streams.—One who uses an unmeandered navigable stream for floating timber must confine himself and his operations to the bed of such stream, and has no right to go upon the banks of the stream in front of land of riparian owners, without their consent, or unless such right has been acquired in a lawful way. (pp. 911, 912.)

Coleman & Fogarty, for the appellants.

Cooley & Horan, for the respondent.

490 HADLEY, J. The respondent brought this action against appellant to procure an injunction against an alleged

threatened interference with the use of a stream for the floating of shingle bolts. The stream is known as the west fork of Woods creek. It commences at the foot of Lake Roesiger, in Snohomish county, and flows therefrom in a southwesterly direction, passing through the lands of both appellant and respondent. Respondent owns an extensive body of timber lands adjacent to the lake and stream, and owns the lands upon both sides of the stream at its source. Appellant's lands lie below those of respondent. The respondent has constructed, and has heretofore operated, a dam at the lower end of the lake, for the purpose of storing the waters within the lake to be used in flooding the stream in order to accelerate the movement of shingle bolts. The complaint charges that appellant threatens, ⁴⁹¹ by obstruction, to prevent respondent from driving its bolts through the stream where it crosses appellant's land. It is alleged that the stream is navigable or floatable for shingle bolts, and that respondent has now about three thousand cords of bolts stored in the lake ready for movement, which it will be unable to move unless appellant is restrained.

The answer denies that the stream is navigable, and alleges that, by reason of the storing of the water in the lake, the flow of the stream is at times entirely stopped, and that at other times respondent suddenly and without warning releases the stored water, and that it runs down and overflows the lands of appellant adjacent to the stream, washes away the soil, and destroys appellant's roads and landings constructed for the movement of his own shingle bolts; that appellant is engaged in removing the cedar timber from his own land, and that by reason of respondent's obstruction of the natural flow of the water, it is impossible for him to run his shingle bolts down said stream. The answer prays for damages, and for an injunction perpetually restraining respondent from interfering with the natural flow of the water in the creek, and from flooding appellant's lands.

The cause was tried before the court without a jury. Findings of facts and conclusions of law were entered, and the decree provides that appellant shall be perpetually enjoined from in any manner obstructing or interfering with the navigation of said stream, or the driving of respondent's shingle bolts across the lands of appellant. It is further provided that appellant shall be restrained from in any manner interfering with or preventing respondent's employes from going upon the banks of said stream for the purpose, only, of breaking jams of

bolts which may occur, ⁴⁹² so long as the going upon said banks does no injury to appellant or his land. This appeal is from that decree.

The first alleged error is that the court permitted any testimony to be introduced in support of the complaint. This contention is based upon the theory that the complaint shows that the stream in question is not navigable or floatable for shingle bolts in its natural condition. It is expressly averred that the stream is navigable for said purpose, but it is argued that other allegations have the effect to negative such fact. The following averment is pointed out as destroying the force of the positive allegation as to navigability: "That it [respondent] has at great expense constructed a dam across the foot of Lake Roesiger for the purpose of storing water, thereby furnishing a sufficient supply of water in the aforesaid stream to conveniently and rapidly float shingle bolts and other timber products down the same to the mill of this plaintiff." We think the conclusion which appellant draws does not necessarily follow when the two averments are taken together. The quoted allegation amounts to no more than the statement that respondent's own convenience, in the moving of its shingle bolts, is better served by the storing of the water and the operation of the dam. But it does not say that the stream is not floatable in its natural state. The court did not err in overruling the objection to the introduction of any testimony upon the above-mentioned ground.

A further point raised under the objection to the introduction of any testimony is that an attempt is made in the complaint to plead an estoppel against appellant, but that the allegations are insufficient to charge an estoppel. The complaint avers that respondent, at its own expense, cleared the said stream of obstructions across appellant's land, in order to facilitate the movement of shingle bolts; that appellant ⁴⁹³ acquiesced therein, actually assisted in the clearing out of such obstructions, thereafter used the benefits accruing therefrom, and also the flow of water as furnished by the dam and improvements constructed by respondent at the lake. We agree with appellant's contention that the facts stated are not sufficient to estop him from claiming now that respondent is interfering with the natural flow of the water. The mere fact that he made no objection to clearing the bed of the stream from obstructions, or that he may even have assisted therein, does not necessarily establish that he consented that the float-

age of the stream should be conducted in any other manner than as provided by the natural flow of the water. The further fact that he may have used the water, as it was sent down the stream by the occasional opening of the dam, during a period of about two years, does not establish his acquiescence in the continued interruption of the natural flow of the water, and amounts to no more than a mere license for a temporary interruption, revocable at will. Such facts do not contain the essential elements of estoppel: *Rigney v. Tacoma Light etc. Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896. It is true, therefore, that appellant is not estopped to assert that the complaint shows that respondent, through the operation of its dam, is interfering with the natural flow of the water. But in view of the allegation that the stream is navigable, it is also true that appellant has no right to interfere with its navigation by respondent, as it is alleged he threatens to do, and it was not error, under the averments of the complaint, to admit evidence upon that subject.

The court found that, with the removal of the artificial obstructions, the stream is capable of navigation by shingle bolts after heavy rains and during freshets, which occur ⁴⁹⁴ with periodic regularity in the spring and fall of each year, and that it is so navigable without the storage of the water in the lake, and without the aid of said dam. It is assigned that the court erred in so finding. We think not, under the evidence. There was sufficient evidence to sustain the finding that the stream, in its natural state, can be practicably used for the floatage of shingle bolts to market, at the times and seasons specified in the court's findings. Such makes it a navigable stream within the holding of this court in *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199. In that case the trial court found Elochoman creek to be an unmeandered stream, and that it can, during annually recurring freshets, be used profitably for the floating of sawlogs to market. This court held it to be navigable, and a highway for that purpose. Woods creek is much smaller than Elochoman creek, is also unmeandered, and is doubtless non-navigable for sawlogs. But the evidence shows that it has sufficient capacity, in its natural state, during annually recurring periods, to float shingle bolts, and while a single shingle bolt contains but a small amount of timber, compared with a sawlog, yet, in the aggregate, timber in that form in this locality is relatively of equal commercial

value with sawlogs, and its carriage to market is, perhaps, as important to the timber industry of this state as that of sawlogs. Elochoman creek was declared to be navigable, for the reason that it furnishes a natural highway for the product of the great logging industry in this state, and Woods creek should also be held to be navigable, because it furnishes a similar highway for the product of another branch of the same industry. Elochoman creek was held to be a navigable stream because it is navigable in fact for the floatage of logs or timber to market. Its navigable character is restricted to a certain commercial and industrial purpose, and does not comprehend navigability ⁴⁹⁵ in the broad sense, as applied in America to the great rivers and water highways. The rule that navigability in fact for commercial purposes makes a watercourse a navigable one was also declared in *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity, because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities, without great expense. Nature has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated, it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent land owner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the land owner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded. Under the former decisions of this court, and for the further reasons herein assigned, the court did not err in holding that Woods creek is a navigable stream for the floatage of shingle bolts. The provision in the decree properly followed, whereby appellant is restrained from interfering with the running of respondent's shingle bolts along said stream where it crosses appellant's lands.

⁴⁹⁶ It being established that the stream is a navigable one, and that appellant shall not interfere with respondent's navigation of it, we must next inquire as to the methods and limitations of that navigation. The court refused to grant appellant an injunction preventing respondent from continuing the storage of the water in Lake Roesiger, and the periodic flushing of the stream. We think this was error. Under well-established principles, appellant is entitled to the natural flow of the water across his land: *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light etc. Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. It is said that, although language used in the above cases declares the general principle, yet there was an actual threatened diversion of a substantial portion of the water in each case, while, in the case at bar, there is no diversion, but simply a detention, followed by a restoration of all the water before it reaches appellant's lands. This detention, however, amounts practically to a total detention for irregular periods, and at times unknown to appellant, without warning, it is released in such quantities as to greatly increase the natural flow, and, according to testimony in the record, actually causes an overflow of his lands. The general principle governing the fundamental rights of all riparian proprietors is well stated as follows: "Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level": *Gould on Waters*, 3d ed., sec. 204.

⁴⁹⁷ That such a detention of water as is shown in this case is prejudicial to the appellant's rights appears from the following authority: "It is an unreasonable detention of the water to gather it into reservoirs for future use in a dry season, or for the purpose of obtaining a greater supply than the stream affords by its natural flow in ordinary stages, or in order that, by letting it off occasionally, a flood may be obtained for the purpose of floating logs": *Cooley on Torts*, 2d ed., p. 694. The maintenance and operation of the dam prevents appellant from navigating the stream himself at times when he may wish to do so, thereby obstructing navigation, and, unless he consents

to its maintenance, the dam is to him a nuisance, which he is entitled to have enjoined: *Carl v. West Aberdeen etc. Co.*, 13 Wash. 616, 43 Pac. 890; *Sultan etc. Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114. We therefore think appellant was entitled to an injunction, preventing respondent from maintaining and operating the dam, and requiring it to permit the water to flow across appellant's lands in its natural and regular way, and respondent must conduct its own navigation of the stream over such natural flow.

Another provision of the decree, with reference to the methods attending respondent's navigation also calls for examination. It will be remembered that, by its terms, the decree prohibits appellant from interfering with respondent's employes in the way of preventing them from going upon the banks of the stream upon appellant's lands, for the purpose of breaking jams of shingle bolts, so long as the going upon the banks does no injury to appellant or his lands. We think this provision of the decree is also erroneous. We believe we went as far as we should go in the interest of public convenience, when we held, in *Watkins* ⁴⁹⁸ v. *Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199, that private land owners hold the beds of unmeandered streams subject to the easement of driving timber products over the land. But we tried to make it clear in that case that the timber driver must confine himself and his operations to the highway itself—the bed of the stream—until the land owner consents to the use of the banks, or until the right to their use has been acquired in a lawful way. If more emphatic statement of that rule is necessary, we now wish to be understood as making it, with all needed emphasis. The fundamental principle of right in the land owner to control his own premises, outside of the bed of the stream, must not be violated. To leave parties under such terms as this decree provides would, in many instances, invite trouble and litigation. Each one would assume to be his own judge as to whether any injury is done to the land. What might appear to the land owner as injury might not so appear to the timber driver, and thus a controversy would at once arise, probably requiring repeated litigation to settle. The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided. Enough controversies will arise about the manner of operating in the bed of the stream to the possible dam-

age of the adjacent land, without adding thereto those arising from semi-legalized trespass upon private premises, which would be the case if it were judicially held that one may operate upon private lands against the owner's consent, and without compensation.

The court found that respondent's acts have produced no actual injury or damage to appellant or his lands. Appellant contends that it was error to so find. The evidence conflicts upon this subject, and we shall not disturb the ⁴⁹⁹ finding. No judgment for damages will therefore be directed.

The decree should be modified in accordance with what has been herein said. The cause is remanded, with instructions to the trial court to enter a decree conformable to this opinion. The appellant shall recover the costs of the appeal, and neither party shall recover costs in the lower court.

Fullerton, C. J., and Mount, Anders, and Dunbar, JJ., concur.

In the Subsequent Case of *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046, it appeared that the latter company was a private corporation but not a boom company, and that it sought to exercise the right of eminent domain against a lower proprietor for the purpose of facilitating the floating of logs down a stream, and also to accomplish this purpose by means of dams and artificial freshets during the time of the year when the stream was not navigable, to the damage of the lower proprietor, and so as to interfere with his use of the stream. The lower proprietor sought for and obtained an injunction, restraining the obstruction and such use of the stream. In affirming the judgment of the lower court and disposing of the questions presented the supreme court said: "The first contention on the part of the appellant, namely, that it has the right to condemn a right of way along the stream over the respondent's land for a logging way is determined against it by the case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681. It was there held that the statute attempting to confer upon the owner of timber lands the power to condemn a right of way for a logging road and lumbering purposes was in contravention of the state constitution, and therefore void. As there is no such right independent of the constitution and statute, it is plain that the appellant's action to condemn can avail it nothing, and its plea that it has brought such an action does not require the court to await its result before restraining it from making an unlawful use of the respondent's property. It is true, this court has upheld the statute relating to the organization of boom companies, which had for its object the improvement of streams, such as the one in question, so as to make them float-

able for logs at all seasons of the year, but that statute does not aid the appellant. The appellant is not organized as a boom company. It does not purpose improving the stream for the use of the public, and engaging in the business of transporting logs down it for the public, but seeks to acquire the right for its own private benefit, to the exclusion of everyone else. This it cannot do by the exercise of the right of eminent domain. It has no power to exercise such a right: *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681.

"The next contention is that the court erred in enjoining the appellant from floating logs down the stream by means of artificial freshets and splashes. The argument is that the stream is a navigable one, and that it has the right to use it for the purpose of floating logs, and is liable only for a misuse or abuse of the privilege, and that the evidence fails to show that there was any abuse or misuse in the present case. The stream in question is undoubtedly navigable for floating logs for a part of the year, and during that time the appellant, as well as others, may use it for that purpose. But that is not the case before us. The appellant was not attempting to float logs during the navigable season of the year, but was attempting to do so when the stream, in its natural state, would not float them. It sought to remedy this by creating unnatural conditions—by the creation of artificial freshets—which conditions damaged and destroyed the respondent's property. This was an abuse of the right of navigation, and for that an injunction would properly lie: *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245; *Monroe Mill Co. v. Menzel*, 33 Wash. 487, ante, p. 905, 77 Pac. 813.

"It is next said that the injunction is too sweeping, in that it prohibits the appellant from operating its dam for any purpose, but a reading of the context of the judgment clearly shows that all that was meant was that the appellant should not operate it to float logs down the stream by means of artificial freshets and splashes, and not that it could not use it for such other purposes as it might find convenient in the conduct of its business.

"It is further contended that the respondent is not entitled to relief because his dam is an obstruction to navigation, and he ought not to be allowed to complain of the appellant so long as he was making a misuse of the stream. But if this were a sufficient reason for denying the respondent the right to relief, we fail to find that the contention is supported by the evidence. An officer of the appellant did testify that logs could not be floated down the stream without making use of the respondent's dam, but he was speaking of floating logs by means of freshets and splashes, and not of floating when the stream would convey them in its natural state. On the other hand, the respondent testified that his dam did not obstruct the river, that he had constructed in it gates through which logs and other timber products could pass whenever the stream was capable

of floating them. We think, therefore, that the evidence was insufficient to warrant the court in declaring the dam a nuisance, and ordering its removal. In order to successfully market logs by the use of a stream of this character, dams and booms are necessary; in fact, such streams can hardly be used for navigating logs without them. Being necessary, their use is lawful when reasonably exercised, and it is only when the right is misused or abused that other navigators can complain of them as obstructions. We do not wish, however, to be understood as foreclosing the appellant's right to complain, should the dam prove to be an obstruction, when an actual test under normal conditions is made. Should it then prove to be a nuisance, the appellant, or anyone injured by it, may have it corrected by an action brought for that purpose."

A Stream is Navigable on which boats and barges pass up and down at certain seasons of the year: *Miller v. Enterprise Canal etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115. A public highway for floatage in a stream exists when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use: *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232. But see *People v. Elk River Mill etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125.

The Right to Use a Stream for Navigation extends only to the bed thereof, and not to an appropriation, either permanently or temporarily, of the soil, trees and vegetation on its banks, as where log booms are fastened across the stream and the banks are washed away by the accumulation of water and timber: *Smith v. Atkins*, 110 Ky. 119, 96 Am. St. Rep. 424. See generally, on the right to use streams for logging purposes, *Pickens v. Coal River Boom etc. Co.*, 51 W. Va. 819, 90 Am. St. Rep. 819, and cases cited in the cross-reference note thereto.

STATE v. IDE.

[35 Wash. 576, 77 Pac. 961.]

CONSTITUTIONAL LAW—Poll Tax.—A statute providing that certain cities of a designated class may levy upon and collect from every male inhabitant between certain ages an annual street poll tax, but exempting members of voluntary fire companies from the payment of such tax, is unconstitutional and void, as not being uniform taxation, and long acquiescence in such statute cannot legalize it. (p. 923.)

Brinker, Coleman & Ballinger, for the appellant.

A. W. Buddress, for the respondent.

577 **ANDERS, J.** On June 22, 1903, William Furlong filed a verified complaint in the police court of the city of Port Townsend, alleging, in substance, that he was, at said time,

the city marshal and city street poll tax collector of the city of Port Townsend, a city of the third class, in the county of Jefferson and state of Washington, and that on said day one C. W. Ide, then and there being a male inhabitant of said city between the ages of twenty-one and fifty years, and not a member of any volunteer fire company of said city, nor a member of the militia of the state of Washington, did then and there commit the misdemeanor of failing and refusing to pay to said city street poll tax collector, on demand, his, the said defendant's, city annual street poll tax, for the year 1903, committed as follows: That the said city street poll tax collector did then and there personally ⁵⁷⁸ demand of and from said defendant, C. W. Ide, the sum of two dollars for the payment by defendant to said city and to its said street poll tax collector, the said city annual street poll tax for the year 1903, but said defendant did then and there willfully and unlawfully fail and refuse to pay to said city street poll tax collector said sum of two dollars for his city annual street poll tax of said city for the year 1903, contrary to ordinance No. 675 of said city, entitled "An ordinance imposing and levying an annual city street poll tax for the year 1903, and providing for the collection thereof," approved June 3, 1903, and contrary to ordinance No. 639 of said city, entitled "An ordinance to provide for the collection of a city street poll tax, and making the refusal to pay the same a misdemeanor, and to provide for the appointment of a tax collector and deputy," approved on May 3, 1899.

A warrant was issued on this complaint, and the defendant, having been arrested thereon and brought into court, filed a demurrer to the complaint on the following grounds: 1. That it appears upon the face of the complaint that defendant has not violated any law; 2. That said complaint fails to state facts sufficient to constitute a crime or misdemeanor of any kind; 3. That said complaint does not charge any offense against the laws of the state of Washington; 4. That said complaint does not charge defendant with the commission of any crime or misdemeanor under the ordinances of the city of Port Townsend.

The demurrer was overruled, and, on the hearing in the police court, the defendant was convicted and fined, and from the judgment he appealed to the superior court. The demurrer was again argued and considered in the superior court and was by that court overruled. Upon the trial in the superior court the defendant was convicted and fined ⁵⁷⁹ two dollars and costs, and it was thereupon adjudged that he be imprisoned in the

county jail until such fine and costs be paid, unless otherwise discharged by law. From this judgment and sentence the defendant has appealed to this court.

Section 1 of ordinance No. 675, which is mentioned and referred to by its title and date of approval, provides, "That there be, and hereby is, imposed and levied an annual city street poll tax upon each male inhabitant between the ages of twenty-one and fifty years, residing in said city, excepting any member of any volunteer fire company in said city, the sum of two dollars, payable on demand between the first day of June, 1903, and the first day of September, 1903." And section 2 provides, "That the poll tax hereby imposed and levied shall be collected as provided by ordinance No. 639 of said city entitled 'An ordinance to provide for the collection of a city street poll tax, and making the refusal to pay the same a misdemeanor, and to provide for the appointment of a tax collector and deputy,' passed by the city council of said city on the second day of May, 1899, and approved on the third day of May, 1899."

Ordinance No. 639, above mentioned and described, contains, besides others which it is not necessary to mention, the following provisions:

"Section 1. That it shall be the duty of the city marshal between the first day of May and the first day of September of each year to collect all city street poll taxes levied or assessed by the city council, as herein provided, and shall give to each person paying such city street poll tax a receipt therefor. . . .

"Sec. 2. That the said city marshal shall receive in full compensation for his services for the collection of the said city street poll tax, under this ordinance, the sum of ten per centum upon all moneys so collected.

"Sec. 3. If any person liable for the city street poll tax herein provided for, shall fail, refuse or neglect to ^{see} pay the same upon demand by the city marshal, the city marshal shall proceed to collect the same as herein provided. . . .

"Sec. 5. That any person who shall fail, refuse or neglect to pay upon demand to the city marshal, or his deputy, the annual street poll tax, which shall have been levied or assessed by the city council of said city, or which may be hereafter levied or assessed by the city council of said city, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars, or be imprisoned not exceeding thirty days, or both such fine and imprisonment in the discretion of the court.

"Sec. 6. That it shall be the duty of the city marshal to collect all the city street poll tax from every person liable therefor, and on the neglect or refusal of such person to pay the same, he shall collect the same by seizure and sale of any personal property owned by such person. The sale to be made after three days' written notice of time and place of such sale to be posted in three of the most public places of said city before the day of sale. . . .

"Sec. 13. The city marshal shall enforce the payment of the city street poll tax by any and all the modes herein provided in the name and at the cost of the city."

The constitution of the state (article 11, section 10) provides that the legislature shall, by general laws, provide for the incorporation, organization and classification in proportion to population, of cities and towns; and it is conceded that Port Townsend is a city of the third class, duly organized and existing under and by virtue of a general law passed by the legislature in accordance with the mandate of the constitution. By that law Ballinger's Code, (sec. 938) the city council of such city is empowered:

"Sec. 7. To impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: Provided, that any member of a volunteer fire company in such city shall be exempt from such tax. . . .

"Sec. 16. To impose fines, penalties and forfeitures for any ~~and~~ and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars nor the term of such imprisonment exceed the term of three months."

If the provisions of section 938 of the Code which we have quoted are not in conflict with the constitution of the state, or of the United States, it can hardly be disputed that the ordinances founded thereon, and numbered 675 and 639, are valid enactments of the city of Port Townsend. And if the ordinances in question are valid, we think the averments of the complaint are sufficient to constitute an offense, and that the demurrer thereto was properly overruled.

But it is earnestly insisted by the learned counsel for the appellant that the ordinances and statute providing for the imposition and collection of this city street poll tax are, each

and all, violative of the constitution of the state and of the fourteenth amendment to the constitution of the United States.

Before proceeding to the consideration of the objections interposed by appellant to this poll tax law and these city ordinances, we deem it proper to observe that it is settled by the highest authority that a legislative enactment is presumed to be constitutional and valid until the contrary clearly appears. In other words, the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity. And, when the constitutionality of an act of the legislature is drawn in question, the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject: *Cooley's Constitutional Limitations*, 7th ed., pp. 225, 252-254, and cases cited. See, also, *Francis v. Atchison etc. Ry. Co.*, 19 582 Kan. 303-306. We have mentioned these well-established rules because we believe that they should always be kept in mind when the court is called upon to declare invalid an act of the law-making body, a co-ordinate and independent part of the government.

The first and chief contention of appellant is that subdivision 7 of section 938 of the Code, above quoted, and the ordinances founded thereon, are unconstitutional and void, for the reason that the tax attempted to be levied and collected under the ordinance is levied and imposed upon males between the ages of twenty-one and fifty years alone, and not upon females, nor upon males over the age of fifty years, nor upon males under the age of twenty-one years, nor upon the members of volunteer fire companies.

Although the sum involved in this case is small, the question presented for our determination is one of great importance to the various municipalities of the third class throughout the state. This is the first time this precise question has been before this court for determination, and we find, upon investigation, that the decisions of other courts of last resort bearing directly upon the question are far from numerous.

It is true, we have several times had occasion to pass upon the validity of statutes and ordinances providing for the payment of license taxes, or fees, by persons engaged in certain occupations or callings, and have held that such exactions, although imposed by the taxing power, are not taxes within the meaning of the constitution, or of the ordinary revenue laws: See *Fleetwood v. Read*, 21 Wash. 548, 58 Pac. 665, 47 L. R. A. 205; *Stull*

v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796. And in State v. Clark, 30 Wash. 439, 71 Pac. 20, we held that the inheritance tax law which exempts from its provisions sums below ³⁸³ ten thousand dollars, when the estate passes to direct heirs and kindred, but grants no such exemption to collateral heirs or strangers to the blood who are devisees, and which does not require all classes of persons mentioned therein to pay taxes on the property received by them at a uniform rate, is not in conflict with the constitutional provisions requiring uniformity in the rate of assessment and taxation of property, for the reason that the so-called inheritance tax is only a charge upon the passing of the estate by succession and the privilege of the heirs or devisees to take it, and not a tax on property.

The tax in question is not a tax on property, but it is nevertheless a tax, under any proper definition of that term. It is a poll, or capitation, tax, and is so denominated both in the statute and the ordinances. It is levied for a public purpose, and is clearly a revenue measure. But its assessment is not governed by the general revenue law, or, strictly speaking, by section 2 of article 7 of the state constitution, which declares that the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state according to its value in money.

It is settled law that the power of taxation is a legislative power, and an incident of sovereignty, and when the people adopt a constitution and thereby create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of such general power. And unless its power of taxation is limited by constitutional provisions, the state, by virtue of its sovereignty, has the power to tax all persons and property within its jurisdiction: Cooley on Taxation, 2d ed., pp. 4, 5; Cooley on Taxation, 3d ed., pp. 7-9, and cases cited. See, also, Judson on Taxation, sec. 431. Several of the state constitutions provide for the imposition of poll taxes, but such taxes are, it seems, ⁵⁸⁴ prohibited by the constitutions of Ohio and Maryland: See 1 Desty on Taxation, 296.

Our constitution does not expressly mention such taxation, and as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument, it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited

from authorizing it to be levied by some provision of the constitution.

While it is conceded by counsel for appellant that the legislature may, in the absence of constitutional restrictions, "confer upon a city almost supreme power over local taxation," yet they contend that the tax in question, by reason of its lack of uniformity, is repugnant to section 9 of article 7 of our constitution, and therefore void. That section of article 7 reads as follows: "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

Section 12 of article 11 of the constitution provides that, "The legislature shall have no power to impose taxes upon . . . cities . . . or upon the inhabitants or property thereof, for . . . city . . . purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." These two provisions are the only ones relating to the vesting of the power of taxation in municipal corporations. And they clearly indicate—especially the latter—that the legislature may authorize the taxation, by cities, of persons, ⁵⁸⁵ as well as property, within their limits. Conceding, as we must, that the legislature had the right to delegate to cities of the third class the power to levy poll taxes on the inhabitants thereof, the question naturally arises whether, in this instance, they exercised the power in conformity with the constitution. As we have seen, section 9 of article 7 of the constitution empowers the legislature to vest all municipal corporations with authority, for corporate purposes, to assess and collect taxes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body levying the same. It is claimed by the learned counsel for the respondent, as we understand his argument, that this constitutional provision applies only to the taxation of property, and that this court has so decided in several cases. But counsel is in error, so far as the decisions of this court are concerned. The cases referred to relate to license taxes and the like, which are not deemed taxes, as that term is ordinarily understood, and they are therefore not applicable to the case in hand.

The constitution says, in effect, that all municipal corporations may tax persons as well as property if authorized so to do by the legislature, and we are not at liberty to construe that provision so as to eliminate, or give no effect to, the words "as to persons," therein contained, which we would be obliged to do in order to hold that it was the intention of the framers of that instrument that property alone should be taxed by municipal corporations. All the power possessed by cities and other municipal corporations to tax either property or persons is conferred upon them by the legislature, whose power, as we have already intimated, is practically, though perhaps not absolutely, unlimited in the absence of constitutional restrictions. And it will be observed that the only restriction imposed by the constitution upon the power of the legislature to vest municipal ⁵⁹⁸ corporations with the authority to tax persons and property is that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." It is conceded by counsel for appellant that the uniformity rule in taxation usually prescribed by law does not preclude the legislature from selecting and classifying, in a proper and reasonable manner, the subjects of taxation, and that rule is so firmly established that the citation of cases in support of it is entirely unnecessary.

But it is claimed on behalf of the appellant that the rule of uniformity prescribed by the state constitution was, in this instance, wholly disregarded and ignored by the legislature in exempting from the tax all females, all males not within the designated ages, and members of volunteer fire companies, and that the classification of the persons to be taxed is arbitrary and unreasonable, because it is not based upon any "difference which bears a just and proper relation to the attempted classification." As to the right to classify subjects of taxation, this court, in *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947, where the question of classification was under consideration, said: "It is true that the mere fact of classification is insufficient to relieve a statute from the reach of this clause of the constitution—that it must appear that the classification is made upon some reasonable and just difference between the persons affected and others, to warrant classification at all." And in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666, in which the question of the power of classification is elaborately discussed, the supreme court, respecting such power, observed: "That

must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily ⁵⁸⁷ and without any such basis." The classification made in imposing this tax is based solely upon age and sex. It has no relation to the property of the persons to be taxed, or to their ability to pay. The persons selected to bear the burden are under no greater obligations to pay for keeping the streets in repair than others who are exempted from the payment of the tax. Does such classification, then, rest upon a reasonable difference between the persons taxed and others who are not taxed? It has been stated by our highest court that there is no precise application of the rule of reasonableness of classification, and that there cannot be an exact exclusion or inclusion of persons and things: *Magoun v. Illinois etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037.

Where exemptions from taxation are permissible, the reasonableness of the classification of subjects must, therefore, be determined from the facts and circumstances appearing in each particular case. It is urged on the part of the respondent that the statute under consideration ought to be upheld because the people have acquiesced in it, and these taxes have been levied and collected under it in cities throughout the state ever since the organization of the state government; and *City of Fairbault v. Misener*, 20 Minn. 396, is cited in support of that proposition. The constitution of Minnesota contained the following clause: "All taxes to be raised in this state shall be as nearly equal as may be." Pursuant to the authority given by its charter, the city of Fairbault, in each of the years 1872 and 1873, levied and assessed a poll tax of two dollars on every qualified voter, except members of fire-engine, hook and ladder, and hose companies. The defendant *Misener* refused to pay the poll tax assessed against him for each of those years, and an action was brought against him before a justice of the peace to recover the same. The justice ⁵⁸⁸ rendered judgment in favor of the defendant, which, on appeal, was affirmed by the district court, and the plaintiff appealed to the supreme court. The principal question before the court in that case was whether the clause in the city charter exempting firemen from the payment of poll tax was repugnant to the provision of the state constitution above set forth, and the court held that it was not. It seems apparent from expressions in its opinion that the decision of the court was largely influenced by the fact that a long-con-

tinued acquiescence of the people in the statute under which the taxes in question had been collected had established a legislative and popular construction of the constitution, which, in the opinion of the court, was entitled to great consideration. And it is true that, in case of doubt in the mind of the court as to the proper construction of any particular provision of the constitution, a contemporaneous interpretation, or the subsequent practical construction, of such provision is entitled to great weight. But, in the language of Judge Cooley: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed": Cooley's Constitutional Limitations, 7th ed., pp. 106, 107. ⁵⁸⁹ See *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111, 49 Pac. 243.

The Minnesota case above cited is confidently relied on by counsel for the respondent as supporting the ruling of the trial court in this case, and it is, in fact, more nearly in point than any other of the numerous cases cited. But conceding that decision to be correct under the constitution and laws of Minnesota, it cannot be said to be entitled to controlling influence here, for the reason that the general constitutional provision there considered is materially different from the provision of our constitution now before us for interpretation, and which declares, as we have seen, that taxes for corporate purposes "shall be equal and uniform in respect to persons and property within the jurisdiction of the body levying the same."

The tax attempted to be collected in this instance is not uniform even as to the persons included in the classification made by the legislature, for some persons in the general class are exempted from the payment of the tax. It would therefore seem clear that the section of the statute now under considera-

tion is repugnant to section 9 of article 7 of the constitution, and consequently void.

This conclusion is fully supported by the decision of the supreme court of Illinois in *Hunsaker v. Wright*, 30 Ill. 146, wherein the constitutionality of a county tax levied upon property within the limits of the city of Cairo was in question, the provision of the constitution there interpreted being in substance identical with section 9 of article 7 of our constitution. The lower court in that case enjoined the collection of the tax, and its ruling was affirmed by the supreme court. The constitution of that state declared that "the general assembly shall provide for levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his or her property," and that, ⁵⁹⁰ "the corporate authorities of counties, . . . cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." And with regard to those provisions, the court said: "These provisions were manifestly inserted in the fundamental law, for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for state, county or municipal purposes. The design was to impose an equal proportion of these burdens upon all persons within the limits of the district or body imposing them. Under these provisions the legislature has no power to exempt or release a person, or community of persons, from their proportionate share of these burdens. Not having such power themselves, they are unable to delegate such power to these inferior bodies." See, also, to the same effect, *Cooley on Taxation*, second edition, pages 25, 26. We have refrained from discussing the numerous cases cited by counsel upholding levies of taxes payable in labor on highways, for the reason that we have deemed such cases inapplicable to the case at bar. Though in the nature of a tax, such levies are, in general, referable to the police power.

"Neither in common speech nor in customary revenue legislation would a burden of this nature be understood as embraced in the term 'tax'; and statutory provisions for assessment are not therefore applicable to it unless made so in express terms": *Cooley on Taxation*, 2d ed., p. 15.

Our conclusion is that both the ordinances for the violation of which appellant was tried and convicted, and the provision

of the statute upon which they are founded, are unconstitutional and void, and the judgment and sentence is therefore reversed and the action dismissed.

Hadley and Mount, JJ., concur.

Fullerton, C. J., and Dunbar, J., dissent.

Constitutional Requirements as to equality and uniformity of taxation are usually limited in their application to direct taxes on property. They do not apply to privilege, occupation and license taxes (Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143; Denver City Ry. Co. v. Denver, 21 Colo. 350, 52 Am. St. Rep. 239); nor, it is said, to poll taxes: Commissioners of Ottawa County v. Nelson, 19 Kan. 234, 27 Am. Rep. 101, citing Sawyer v. Alton, 4 Ill. 127; Town of Pleasant v. Kost, 29 Ill. 490.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

BURROUGH v. ELY.

[54 W. Va. 118, 46 S. E. 371.]

COMMON-LAW LIEN.—The Right of Possession of the chattel is all that is secured by a common-law lien thereon for work and labor performed. (p. 927.)

COMMON-LAW LIEN.—There is No Right of Sale of the chattel by virtue of a common-law lien thereon for work and labor performed, either at law or in equity. (p. 927.)

COMMON-LAW LIEN.—A Lienor Wrongfully Deprived of his possession of the chattel on which he has performed work and labor may maintain detinue or trover. (p. 927.)

COMMON-LAW LIEN.—A Suit in Equity to Sell the chattel is not authorized by a common-law lien thereon for work and labor performed. (p. 927.)

Edward A. Brannon and C. C. Higginbotham, for the appellant.

W. W. Brannon and W. B. McGary, for the appellee.

¹¹⁸ DENT, J. C. E. Burrough appeals from the decision of the circuit court of Lewis county rendered on the twenty-seventh day of March, 1902, dismissing a bill in chancery, filed by him against Ralph H. Ely and others for the purpose of enforcing a common-law lien claimed by the plaintiff on a certain lot of lumber manufactured by him for the defendant Ely.

The first question that presents itself is as to whether such bill is maintainable. If not, the plaintiff's remedies to determine and sustain his lien must be found in a court of law. ¹¹⁹ The nature of the lien is only the right of possession of certain personal property on which work and labor has been performed. Hence there is no right of sale by reason thereof either at law or in equity.

The right of possession is all that such lien secures, which may be maintained by proper suit at law, until the right of sale has been acquired either under execution or attachment.

If the lienor is wrongfully deprived of his possession, he can maintain detinue for the goods or trover and conversion for their value to the amount of his claim: 2 Tucker's Com., 3d ed., 83; 13 Ency. of Pl. & Pr. 126.

In the absence of statutory provision to that effect, such lien does not authorize a suit in equity to sell the property for the payment of the debt.

Retention of possession is the full force of such lien, and nothing more. To this extent alone it is enforceable, and this by suit at law: 19 Am. & Eng. Ency. of Law, 2d ed., 34; 13 Ency. of Pl. & Pr. 123, 126.

The decree is affirmed.

A *Common-law Lien* gives the party retaining the chattel the right to hold it as security for the debt, but not to sell it: *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 74 Am. St. Rep. 380. As to the jurisdiction of equity to enforce such a lien, see *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 74 Am. St. Rep. 380, and note. And as to the nature of common-law liens generally, see *Sullivan v. Clifton*, 55 N. J. L. 324, 39 Am. St. Rep. 652; *Fitzgerald v. Elliott*, 162 Pa. St. 118, 42 Am. St. Rep. 812.

STATE v. FAUDRE.

[54 W. Va. 122, 46 S. E. 269.]

INTERSTATE FERRIES.—The State of Ohio may Establish ferries on its side of the Ohio river and fix the charges for ferriage across to West Virginia. (p. 932.)

INTERSTATE FERRIES.—A Law of West Virginia regulating ferry charges across the Ohio river does not apply to a ferry established by the state of Ohio and carrying a passenger from its shores to West Virginia. (pp. 936, 937.)

Attorney general, for the state.

H. R. Howard, for the defendant below.

¹²² BRANNON, J. Bert Faudre was indicted in the circuit court of Mason county for charging C. E. Winger ten cents for ferriage of himself from Gallipolis, in the state of Ohio, over the Ohio river to the West Virginia side, contrary to the

order of the county court of Mason county fixing five cents as the charge. The case was tried by the court in lieu of a jury, and the court found Faudre guilty and fined him ten dollars. As I understand the evidence, the defendant was operating the ferry under a ferry franchise conferred by the Virginia legislature in 1796, and re-enacted in 1819. He justified this charge under an ordinance of Gallipolis establishing a ferry "from the end of Court street" in that city, "across the Ohio river to the Virginia shore," and a license from the city to operate the ferry, the ¹²³ ordinance allowing the ten cents charge; he operating under this license also.

The Ohio is a great navigable river dividing the states of Ohio and West Virginia, a public highway open to all. Unless an exception to the general rule, we must apply the general rule, which is, that "a state has the right to grant the exclusive right to ferry from its shores across a navigable river between two states": 16 Am. & Eng. Ency. of Law, 1091; Cooley's Constitutional Limitations, 731. "In the case of boundary rivers, like the Mississippi, a ferry franchise conferred by a single state is valid without the concurrent sanction either of Congress or of the state upon the opposite side of the river, or the right of landing beyond the limits of the state by which the grant is made": Gould on Waters, sec. 35; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Gear v. Bull, 34 Ill. 74. To say that a state has not this right to give its people facility of departure would detract from its sovereignty and be of great detriment. A ferry need not own land on both sides: Conway v. Taylor, 1 Black, 603, 17 L. ed. 191. The point of departure is the seat, the base, the home of the ferry: Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 43 S. E. 107. "A ferry is in respect of the landing place, and not of the water. The water may be to one, the ferry to another": 13 Viner's Abridgment, 208A; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191. Thus, as the Ohio ferry had a foothold presumably on the end of Court street, Gallipolis, it was a lawful ferry. Under this rule no state can prohibit another from granting a ferry right. Under its franchise the boat can depart, and the stream being a highway, it can navigate its waters, and it can land on the opposite shore, and cannot be prevented by the state on the opposite shore. It cannot land on private property without consent, but it has right to land at a public wharf, paying reasonable wharfage. In carrying persons and property it is engaged in interstate commerce and its landing could not be prohibited or taxed,

though it may be made to pay wharfage. The landing is a necessary part of the act: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158; *Cannon v. New Orleans*, 20 Wall. 577, 23 L. ed. 417; *Newport v. Taylor*, 16 B. Mon. 784; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. Rep. 732, 27 L. ed. 584. The right to have a ferry includes the right to land. The right to land is incidental to the right to navigate a public river. It is said that "the grant of a ferry franchise ¹²⁴ across a river between two states gives only the right to ferry from the shore of the state granting the franchise": 12 Am. & Eng. Ency. of Law, 1092; *Well v. Chapman*, 2 Iowa, 524; *Gear v. Bullerdick*, 34 Ill. 74.

But it is said that these principles apply only where the boundary of the opposite states is the middle of the river, giving each state indisputable jurisdiction over the shore and half the river, and that such is not the case with the Ohio river, for the reason that when Virginia granted to the Union the northwest territory her grant conveyed the territory "situate, lying and being to the northwest of the river Ohio." Great difference of opinion has been expressed as to whether this reserved Virginia jurisdiction to low or high water mark on the west side of the Ohio. In *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211, it was held that "the jurisdiction of West Virginia is coextensive with the water while confined within its banks." In *Ravenwood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485, it was held that "the bed, banks and shores of the Ohio river are held by the state in trust for the public." This would give West Virginia title to the top of the bank on the Ohio side. The first constitution of this state claims the state's jurisdiction to include "so much of the bed, banks and shores of the Ohio river as heretofore appertained to the state of Virginia"; whilst the second declared without reserve that the state "includes the bed, bank and shores of the Ohio river." But, of course, we have no more than Virginia had. Nor could the constitution confer greater title than in law existed. In *Bridge Co. v. Mt. Pleasant*, 32 W. Va. 331, 9 S. E. 231, I expressed the opinion that our territory extended to the low-water mark. I cited *Garner's Case*, 3 Gratt. 655, in support of this statement. In that case fourteen Virginia judges sitting in the general court were greatly divided and delivered exhaustive opinions, the decision by the majority holding in effect that low-water mark was Virginia's western line. The actual decision imports that. So the supreme court of the United States has several times

held: *Handley v. Anthony*, 5 Wheat. 347, 5 L. ed. 113, the great Chief Justice Marshall, a Virginian, delivering the opinion. In *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. Rep. 1051, 34 L. ed. 329, and *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 612, 19 Sup. Ct. Rep. 553, 43 L. ed. 823, it was again so held. These cases involved the ¹²⁵ boundary line of Kentucky; but as Kentucky was formed from Virginia after the grant of the northwest territory, she has the same western boundary, and these decisions apply. Kentucky has uniformly held the low-water mark: *McFall v. Commonwealth*, 2 Met. 394, 396. Indiana likewise: *Carlisle v. State*, 32 Ind. 55. Ohio holds that her territory extends at least to low water, if not to the middle: *Booth v. Shepherd*, 8 Ohio St. 243.

The chief argument for the line of the top of the bank on the Ohio side is the definition of a river. "A river is a running stream of water pent in on either side by banks, shores or walls." "A fresh-water river, like a tidal river, is composed of the alveus or bed, and the water; but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river": Gould on Waters, secs. 41, 45. For the other side it may be said that to confine Ohio to the top of the bank would deprive her of necessary state powers, such as the erection of wharves and other facilities, as well as police control of her border, and refuse to her necessary state power, and detract from her sovereignty. As will be seen in *Handley v. Anthony*, 5 Wheat. 347, 5 L. ed. 347, Chief Justice Marshall was influenced by considerations of great inconvenience to the new states that were to be formed out of this cession by Virginia. Virginia, by act of January 2, 1781, made it a condition of her grant that new states should be formed out of the territory granted, and it cannot be readily supposed that she intended to deprive such new states of the usual powers of states bounding on public rivers, and cramp their facilities by stopping their jurisdiction at the top of the river bank. It does seem to me that as the constitution of the Union gives to the national supreme court jurisdiction in controversies between states, and its decision must be final, the rulings of that court must be accepted as law. That court has exclusive jurisdiction touching boundary between states: *Virginia v. West Virginia*, 11 Wall. 39. 20 L. ed. 67. I shall not pursue this question, as I know that I

can shed no more light upon it additional to that reflected by the great arguments in the cases cited. If the low-water line be the ¹²⁶ line, there can be no question that Ohio has the right to establish ferries on her shore and to fix rates from the Ohio to the West Virginia shore. We do not say that greater charge could or could not be made from the West Virginia shore to the Ohio shore, as it is not involved. But we are not driven to say, as decision, whether *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211, is sound law. We can decide this case on another ground. After Virginia made the deed ceding to the Republic the northwest territory, Congress passed the celebrated historic ordinance for the government of the territory "northwest of the river Ohio"; providing that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, duty or import thereon." Virginia, by act of December 20, 1788, referred to this ordinance and declared that "the afore-recited article of compact between the original states and the people and states in the territory of the Ohio river be, and the same are hereby, ratified and confirmed, anything to the contrary in the deed of cession of the territory by this commonwealth to the United States notwithstanding." If otherwise before, would not this act accord to Ohio full use of the Ohio river in such modes as rivers are commonly used, among them the power to establish and regulate ferries having their seats on the Ohio side? That is not all. In the Virginia act providing for the formation of Kentucky it is declared "that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed states on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river." How far does the concurrence of jurisdiction of West Virginia and Ohio go? What is meant by it? It is only necessary and proper in this case to say that it goes far enough to give Ohio power on her shore, whatever the line under the deed, to authorize a ferry and govern it by regulations. This concurrence of rightful jurisdiction ¹²⁷ over the Ohio would seem

to give ferries on the Ohio side right to carry both ways, and charge according to Ohio law. This compact of Virginia, on which Kentucky was admitted by Congress into the Union, has been held to be national law by the supreme court: *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 519, 14 L. ed. 249; *Henderson Bridge Co. v. Henderson*, 173 U. S. 610, 19 Sup. Ct. Rep. 553, 43 L. ed. 823. I find that in *Arnold v. Shields*, 5 Dana, 22, 30 Am. Dec. 669, and in *Newport v. Taylor*, 16 B. Mon. 787, it is said of this compact: "Jurisdiction unqualified being, as it is, the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction must entitle Indiana to as much power—legislative, judicial and executive—as that of Kentucky over so much of the Ohio river as flows between them; and consequently neither of them can consistently with the compact exercise any authority over their common river, so as to destroy, impair or obstruct the concurrent rights of the other."

The word "jurisdiction," as here used, must be wide. Why should it be confined to any one of the three agencies of jurisdiction—legislative, executive or judicial? In *J. S. Keator L. Co. v. St. Croix Boom Co.*, 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529, this "concurrent jurisdiction" under said congressional provision is discussed, and it is given broad construction in holding that one state may under it allow a boom hindering navigation of the other side. It may be doubted whether that is such an exercise of power as is lawful, because permanently affecting the right of the other state. "The state of Indiana possesses concurrent jurisdiction with the state of Kentucky for the enforcement of civil and criminal law on the Ohio river, where the two states possess the opposite shores": *Sherlock v. Alling*, 44 Ind. 184. The court said Indiana's legislation covered the river. It is only necessary for us to say now that Ohio had power to authorize a ferry and fix a charge for a person coming from its shore. The dividing line is one thing; concurrent jurisdiction is another thing. Kentucky, though having the same line as West Virginia, has always conceded to states on the Ohio opposite right to establish and regulate ferries, and has held that her laws do not apply to them: *Newport v. Taylor*, 16 B. Mon. 699; *Reeves v. Little*, 7 Bush, 469. See *Gear v. Bullerdick*, 34 Ill. 74. How can our law govern a ferry created by Ohio? After writing to this point, pursuing the matter of concurrent ¹²⁸ jurisdiction accorded states on the west of the Ohio by Virginia, I find that

Congress, in admitting Illinois, provided that its western line should be the middle of the Mississippi river, and that "said state shall have concurrent jurisdiction . . . on the Mississippi river with any state or states to be formed west thereof." In *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260, held that "neither Illinois nor Missouri can exercise exclusive jurisdiction over any part of the Mississippi, nor is either confined in the exercise of its own jurisdiction to the middle thereof. The two states exercise concurrent jurisdiction on the river for all judicial purposes." In matters to which this concurrence applies the state which first assumes retains jurisdiction of a matter to the exclusion of the other. In *State v. Mullen*, 35 Iowa, 199, the court interpreted this concurrence to give Iowa power to try a crime done on a boat near the Illinois shore. But the same court, in *Buck v. Ellenbolt*, 84 Iowa, 394, 51 N. W. 22, 15 L. R. A. 187, denied power in the state to abate a nuisance on an island east of the middle line, saying it was not on the river. But it said in all matters touching commerce on the river the state had concurrent jurisdiction over the whole river. As shown above, a ferry-boat is an instrument of commerce and interstate commerce. Where two states bound on a river there is concurrence over the whole stream without compact: *Atchison v. Endless etc.*, 40 Fed. 253; 16 Am. & Eng. Ency. of Law, 1st ed., 258. By reason of this concurrent jurisdiction, regardless of the line, the decision that *Plants* was guilty in *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211, was right, as he sold liquor on a boat lying in the water of the Ohio.

It is immaterial that the charge was collected from Winger after leaving the Ohio side. The fact that the Virginia franchise authorized ferriage both ways would not derogate from the right of Ohio to establish a ferry.

If it would change the result that the defendant was acting under the Virginia franchise before he got the Ohio license it does not appear which he accepted first.

After further examination of the question involved in this case, I find it settled by the decision of the supreme court of the United States, as also by the Kentucky supreme court in *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191. A Kentucky ferry sought an injunction against an Ohio ferry to prevent its ferriage both ¹²⁰ ways over the Ohio river, claiming exclusive right to do so under the Kentucky ferry grant. The lower state court awarded a total injunction, thus forbidding the Ohio ferry from ferrying either from Kentucky to Ohio or from Ohio

to Kentucky. The Kentucky supreme court reversed this decree, and modified the decree of the lower court by limiting the injunction so as to prevent the Ohio ferry only from ferrying from Kentucky to Ohio. It thus recognized the full right of the Ohio ferry to ferry from Ohio to Kentucky. It conceded the right to ferry if "authorized transport from the Ohio shore from a ferry established on that side under the laws of that state," but held that the Kentucky grant gave exclusive right to ferry from the Kentucky shore: *Conway v. Taylor*, 1 Black, 628, 17 L. ed. 191. The supreme court of the United States affirmed this decision, conceding as beyond dispute the right of Ohio to establish a ferry upon its soil, saying that "the concurrent action of the two states is not necessary to the grant of a ferry franchise on a river that divides them. A ferry is in respect of the landing, not the water; the water may be to one, the ferry to another." Here the water is a public navigable way, and who disputes Ohio's right to the bank of the river? Owning to the bank she may attach a ferry to it. The federal supreme court further said, in speaking of the Kentucky law and decision: "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation and of no complaints by any of those states. It was shown in argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters." In this extract, and in the whole opinion, the supreme court concedes and recognizes the right of Ohio to establish and regulate ferries on its bank of the Ohio. The Kentucky court, though it had statutes prohibiting apparently any ferriage from the Ohio shore except under a Kentucky franchise, refused to apply those acts to an Ohio ferry, and so did the national supreme court. How could it be otherwise considered alone under the compact made by Virginia upon the admission of Kentucky into the ¹³⁰ Union? 1 Rev. Code 1819, p. 59. That compact makes the Ohio a public highway, and gives concurrent jurisdiction over it to all states bordering on it, and deprived Virginia of exclusive jurisdiction over it: *Wheeling Bridge Case*, 13 How. 518, 14 L. ed. 249. Yet in this case Faudre was fined for charging a passenger going from Ohio to West Virginia, not from West Virginia to Ohio.

The decisions cited above were based on the compact between Virginia and Kentucky; but when we consider the later Virginia act (Code 1849, c. 1, sec. 2), it is still plainer. Virginia thereby again ratifies that compact by asserting jurisdiction for herself "subject to the provisions contained in the articles of compact between Virginia and Kentucky hereinafter mentioned": See Code 1849, sec. 6. Our code claims for this state jurisdiction over the Ohio "where there is no statute or compact to the contrary": Code, c. 1, sec. 2. This recognizes the concurrent jurisdiction conceded by that compact.

Under such concurrent jurisdiction granted by Virginia it would seem to me that Ohio could grant a ferry valid to carry from both sides of the Ohio; but that is only a suggestion of my own, and not involved in the case. It has been remarked that this doctrine would enable Ohio to ruin every West Virginia ferry. What of it? We cannot help it. It is the result of lawful competition in business under authority of law. It would redound to the public interest in cheapness of ferriage: *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L. R. A. 804.

In *Crop v. Hopkins*, 6 W. Va. 323, the validity of a ferry grant by Ohio is recognized, though the subject is not discussed. "And in case of boundary rivers like the Mississippi a ferry granted by a single state is valid without the sanction of Congress or the state which bounds upon the opposite side of the river, or the right of landing beyond the limit of the state by which the grant is made": *Gould on Waters*, sec. 35. I think the case of *Memphis v. Overton*, 3 Yerg. 387, sustains the foregoing view: See *City of Newport v. Taylor*, 16 B. Mon. 784, 787.

In *McFall v. Commonwealth*, 2 Met. (Ky.) 394, a man was fined for celebrating marriage on a boat on the Ohio; but the court conceded that if Ohio had passed a law to authorize a minister to marry, and had thus exercised concurrent jurisdiction with Kentucky, there could be no conviction. Under these principles ¹³¹ West Virginia ferry rates apply only to West Virginia ferry franchises, and Faudre was not subject to them.

Having taken up this case again I have just noticed that in *Garner's Case*, 3 Gratt. 655, Judge Johnson said: "I conclude, therefore, that Virginia has exclusive jurisdiction to low-water mark on this side of the river, and Ohio has exclusive jurisdiction on the other, while over the permanent river they both possess concurrent jurisdiction, the ultimate property in the

whole river to low-water mark on the Ohio side remaining in Virginia." Here is properly conceded concurrent jurisdiction. The soil on which the river runs is West Virginia soil to low-water mark on the Ohio side; but the water flowing over it is subject to concurrent jurisdiction of both states for certain purposes. It is that concurrent jurisdiction that rules this case. Above I have stated what it means. I add other authorities. Concurrent is "running together; having the same authority; thus we say such and such courts have concurrent jurisdiction; that is, each has the same jurisdiction": *Bouvier's Law Dictionary*. "By conferring 'concurrent jurisdiction' Congress intended to declare that transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its laws. Where a court of one state assumed jurisdiction in a particular case it would be exclusive until relinquished": *Saunders v. New Orleans etc. Anchor Line*, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390. See *State v. George*, 60 Minn. 505, 63 N. W. 100; *Opsall v. Judd*, 30 Minn. 129, 14 N. W. 575; *Memphis v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Meyler v. Wedding*, 22 Ky. Law Rep. 1146, 60 S. W. 20. *Rorer on Interstate Law*, 337, lays down correct law: "The existence of concurrent jurisdiction in two states over a river that is a boundary between them vests in each of such states and its courts, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and its courts, jurisdiction, both civil and criminal, from shore to shore of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary." Observe, that it says that this concurrent jurisdiction applies to "all matters of rightful state cognizance occurring upon such river in all parts thereof."

Now, is not the establishment and regulation of a ferry ¹⁸² a matter of rightful state cognizance? Indeed, is it not a right of navigation? Can you deny that to a state on the Ohio river? Is it not a means of commerce on the water of the river? Can you deny the right of commerce? Observe, that there is a difference between the soil or the ground over which the Ohio runs and its flowing water. The soil and things permanent in or attached to it as a bridge for instance are not subject to Ohio jurisdiction; but a boat used in ferriage is not such; a thing floating on the water. Many cases draw this distinction,

holding that where there is a concurrent jurisdiction in two states upon a river, a state has no power over soil or things fixed in it beyond its line; but as to things not such, but transitory, floating upon it, both have common concurrent powers: *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 19 Sup. Ct. Rep. 553, 53 L. ed. 823. The late well-considered case of *Roberts v. Fullerton*, 117 Wis. 222, 93 S. W. 1111, in the supreme court of Wisconsin shows this distinction. There it is held that as to soil and things attached the concurrent jurisdiction does not extend; but as to things having relation to the water, things transitory or floating upon it, it does fully extend: *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311. Judge Taliaferro (*Garner's Case*, 3 Gratt. 655) said it refers "only to things afloat." Surely both states may establish and regulate ferries over the Ohio.

For these reasons we set aside and reverse the finding and judgment of the circuit court, and find the defendant not guilty, and that he be discharged from the indictment and go thereof without day.

BRANNON, J. I have not said that Ohio could establish a ferry on the West Virginia shore; but I think an Ohio ferry could carry back persons to Ohio.

CONCURRING OPINION.

POFFENBARGER, J. I do not wish to be understood as agreeing to all that is said in the opinion on the subject of concurrent jurisdiction and the character of the ferry franchise. The exercise of a ferry franchise is clearly not a mere incident to the right of navigation. ¹²³ All citizens may use the navigable waters of this country without a license or permit of any kind from any of the states, and are only subject, in that respect, to such regulations as are imposed by the acts of Congress. The right to operate a ferry is an entirely different matter. The right of navigation is exercised in the operation of a ferry, but it confers no right to operate it. That right must be acquired by legislative grant: *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191; 2 Washburn on Real Property, 6th ed., sec. 1215; *Huzzey v. Field*, 2 Crompt. M. & R. 431; *Mayor etc. v. Starin*, 106 N. Y. 1, 12 N. E. 631; *Newton v. Cubitt*, 12 Com. B. 31. A ferry right is separate and distinct from, and subordinate to, the right of navigation: *Tiedeman on Lim-*

itation of Police Powers, 621; 12 Am. & Eng. Ency. of Law, 2d ed., 1089; 21 Am. & Eng. Ency. of Law, 2d ed., 441.

Washburn on Real Property says: "Ferries—that is, rights of carrying passengers across streams or bodies of water, or arms of the sea, from one point to another, for compensation paid by the way of a toll—are, by common law, deemed to be franchises, and could not, in England, be set up without the king's license, and in this country without the grant of the legislature as representing the sovereign power, and do not belong to the riparian proprietors of the soil."

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191, expressly holds that "the authority to establish and regulate ferries is not included in the power of the federal government to regulate commerce with foreign nations and among the several states and with the Indian tribes."

I find no authority which, in my opinion, gives a shadow of countenance to the proposition that a state bordering upon a navigable river, and having concurrent jurisdiction with another state bordering upon the opposite side of such river, may establish a ferry from its own shore across the river and also from the shores of such other state across the river. None of the cases referred to in the opinion stand upon such a state of facts. No such claim was made or upheld in any of them. The nature of a ferry franchise and the obligations imposed upon the state in the granting of it and upon the licensee in accepting it stand opposed to such an idea. A ¹³⁴ ferry franchise is a valuable right. It is property created by law, by the sovereign power of the state: Patrick v. Ruffners, 2 Rob. (Va.) 222, 40 Am. Dec. 740; Huzzey v. Field, 2 Crompt. M. & R. 431, 440; Regina v. Cambrian Ry. Co., L. R. 6 Q. B. 422; Mayor etc. v. Starin, 106 N. Y. 1, 12 N. E. 631; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

As said in the opinion of Judge Brannon, a ferry "is in respect to the landing place, and not of the water." Ohio certainly has no right to the West Virginia shores. All that can possibly be conceded to her is jurisdiction of the shore on her own side of the Ohio river.

As against all except the sovereign granting a ferry franchise, it is exclusive, and shuts out all other persons from the exercise of the right conferred. Concurrent jurisdiction for the establishment of ferries from both sides of the river by each state at the same place is contradictory. Neither state could protect and uphold the right granted by it by controlling

the rates and the result might be a service wholly inadequate to, and unsuitable for, the accommodation of the public. Such a construction would give conflict of jurisdiction rather than concurrence. A safe rule for arriving at a conclusion is the conduct of the states and the construction adopted by them. So far as I am able to find, no state has ever attempted to do such a thing. West Virginia and Kentucky content themselves with granting franchises from their own shores to the opposite shore, and Ohio, Indiana and Illinois with granting franchises from their shores to the opposite shores only. The only real and substantial concurrence in respect to the granting of ferry franchises is to be attained by limiting the power of each state to the granting of such franchises from its own shore to the opposite shore. That gives each state power over the river in that respect. Concurrence is thereby effectuated. The nature of this exercise of the sovereign power is such that if it be carried further there is direct and useless conflict between the two states, which it cannot be supposed was ever intended.

Another view which supports this proposition is that the granting of a franchise does not carry with it a right of landing: 12 Am. & Eng. Ency. of Law, 2d ed., 1097; *Burrows v. Gallup*, 32 Conn. 499, 87 Am. Dec. 186; *Walker v. Armstrong*, 2 Kan. 198; *Prasser v. Wapelle*, 18 Iowa, 327; *Grant v. Drew*, 1 Or. 35. Some decisions ¹³⁵ are to the contrary, but they are against the weight of authority: 12 Am. & Eng. Ency. of Law, 2d ed., 1097.

In *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191, an effort was made by persons under an invalid grant of a ferry franchise from the city of Newport, and a license granted by the state of Ohio to obtain the right to ferry from the Kentucky side, to the detriment of another person holding a valid Kentucky franchise. It does not appear from the report of the case whether the Ohio license purported to give such right to ferry from the Kentucky shore, but the decree of the Kentucky court, which the supreme court of the United States affirmed, inhibited the parties claiming under the invalid Kentucky franchise and the Ohio franchise from ferrying from the Kentucky shore.

My concurrence goes only to the extent of conceding the validity of the ferry franchise from the Ohio side to the West Virginia side granted by the city of Gallipolis, and the right to the holder of that franchise to charge the rate of ferriage fixed by the Ohio authorities, and his innocence of any violation of the West Virginia ferry law in so doing.

CONCURRING OPINION.

DENT, J. While I concur in the conclusion, there are some things in the opinion of Judge Brannon that I do not assent to without reservation. This case depends on the ownership of the northwestern bank or shore of the Ohio river. If it belongs to West Virginia, Ohio has no control over the same, and no right to establish ferries therefrom. The constitution of this state, section 1, article 2, claims it to be a part of this state, and it has been so held in the case of *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485. The constitution also provides in section 1, article 1, that: "The constitution of the United States, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land." This necessarily includes the decisions of the supreme court of the United States. That court has held that exclusive jurisdiction to determine the boundary between states rests with it: *Virginia v. West Virginia*, 11 Wall. 39. It has already determined the boundary between this state and the northwestern territory ceded to the United States by the state of Virginia, including the state ¹³⁶ of Ohio, to be low-water mark on the Ohio side: *Handley v. Anthony*, 5 Wheat. 374, 5 L. ed. 113; *Indiana v. Kentucky*, 136 U. S. 497, 10 Sup. Ct. Rep. 1051, 34 L. ed. 329; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 19 Sup. Ct. Rep. 553, 43 L. ed. 823.

This should settle this question and put it forever at rest, unless the supreme court of the United States should be led to change its position, which is not at all likely, for the very reason that it is the only truly equitable conclusion under the circumstances that the court could justly reach in the interest of the general public good. This gives this state the land to low-water mark on the Ohio side, and Ohio the land between high and low water mark on the same side, which necessarily includes the shore. The shores and bed of the river are thus held respectively by the two states in trust for the public good, and they cannot become the subject of private ownership. Ohio then has control of its shore, with the exclusive sovereign right to establish ferries therefrom to the opposite shore, while West Virginia has the same exclusive right to establish ferries from its shore. To make a complete ferry from shore to shore, both going and coming, requires the consent of both states. The navigable waters that run between the shores is under the concurrent jurisdiction of both states for

the purposes of navigation, although from low-water mark on the Ohio side to the West Virginia shore they are within the state of West Virginia: *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191; Code, sec. 15, c. 44.

In the light of the decisions of the supreme court of the United States, the constitution of this state and the holding of this court in the case of *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485, are wrong in so far as the Ohio shore and banks of the Ohio river are concerned, for when Virginia ceded to the United States all the territory northwest of the Ohio river, the word "river" meant the line of the waters of the river at low-water mark. This is a question which, in my opinion, has been and should remain settled: *Garner's Case*, 3 Gratt. 655; Va. Code 1860, c. 1, sec. 2. The great states of Ohio and West Virginia by mutual compact should fix their line by permanent monuments, so as not to permit it to be subject to the changes of the bed and shores of the river caused by natural and artificial fluctuations. Wisdom would dictate such course.

The Concurrent Jurisdiction of bordering states over the Ohio river is considered by the supreme court of Kentucky in *Meyler v. Wedding*, 107 Ky. 310, 92 Am. St. Rep. 347, and see the cases cited in the cross-reference note thereto.

SNYDER v. PHILADELPHIA COMPANY.

[54 W. Va. 149, 46 S. E. 366.]

PLEADING.—A Variance Between the Writ and the Declaration can be taken advantage of only by a plea in abatement, and it cannot be filed until the writ is made a part of the record by demanding oyer thereof. (p. 943.)

CORPORATION.—A Summons Setting Forth the full corporate name of a defendant corporation is not insufficient because it fails to recite that the defendant is a corporation. (p. 944.)

GAS-WELL.—Letting off Gas Near Highway.—The owner of a gas-well situated near a highway may lawfully open it to allow the gas to blow out the accumulation of water, but he must do so with a due regard to the rights and safety of people using the highway. (p. 945.)

GAS-WELL.—Letting off Gas Near Highway.—Where a gas-well is situated near a highway, persons driving in the road have a right to assume that an agent of the owner of the well approaching it will not open it to blow out the water until they have passed, and

are not chargeable with contributory negligence for failing to turn and fly from the mere prospect of danger. (p. 947.)

GAS-WELL—Blowing Off Gas—Proximate Cause.—If a gas-well is negligently opened to blow out the water, thereby frightening a team in the highway close by, and the driver breaks a line in attempting to control the horses, which causes him to fall from the wagon, the blowing off of the well, and not the weak condition of the line, is the proximate cause of his injury. (p. 949.)

NEGLIGENCE.—The Proximate Cause is not always that which is nearest in time or place to the injury. The meaning of the maxim, "*Causa proxima non remota spectatur*," is that the true cause of an injury is that which brings it about, either by direct operation or by setting in motion other causes as instruments or agents operating under its dominant influence. (p. 949.)

NEGLIGENCE.—The Proximate Cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to the controlling or principal cause. (pp. 949, 950.)

VENUE—Want of, How Taken Advantage of.—If the declaration in an action for personal injuries shows the jurisdiction of the court, the defendant cannot allow the suit to proceed to judgment and then complain that the cause of action did not arise in the county in which the venue is laid. If he proposes to contest the jurisdiction of the court on that ground, he must give notice of it by plea in abatement. (p. 951.)

Rucker, Anderson & Hughes, J. W. McIntire and E. L. Robinson, for the plaintiff in error.

John A. Howard, for the defendant in error.

150 **POFFENBARGER, J.** As the defendant in error, Robert Snyder, driving a two horse wagon loaded with baled hay, along a public road in Wetzel county, approached a point in the road from which a gas-well owned by the Philadelphia Company of West Virginia stood about fifty feet distant, W. W. Little, an agent and employé of said company, opened the valve or gate of the pipe in which the gas was confined under great pressure, and permitted it to escape, thereby causing a hissing and roaring noise, which frightened plaintiff's horses and caused him to be thrown or to fall from the top of the load of hay to the ground, where the wheels of the wagon passed over his leg, badly fracturing it and inflicting, as is claimed, permanent injury. In an action against the company, he recovered a judgment for the sum of two thousand five hundred dollars, as damages for the injury inflicted by the alleged negligence of said company. Of this judgment said company complains.

The first assignment of error is predicated upon the action of the court in overruling the demurrer to the declaration and each count thereof. Upon the demurrer an effort is made to

take advantage of the failure of the summons to say or recite that ¹⁵¹ the defendant company is a corporation, it merely naming the defendant as "The Philadelphia Company of West Virginia." An objection of this kind cannot be raised by demurrer. Advantage of it can be taken only by a plea in abatement on the ground of a variance of the declaration from the writ. In cases other than misnomer, "the defendant on whom the process summoning him to answer appears to have been served shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement": Code, c. 25, sec. 15; Hoffman v. Bircher, 22 W. Va. 537; Anderson v. Doolittle, 38 W. Va. 629, 18 S. E. 724. The omission does not make the writ void, for it is mere matter of description. The corporate name is fully set out and the alleged defect is mere failure to describe the defendant as a corporation. This could have been cured by amendment, and said section 15 permits the amendment to be made. If the defect could be treated as a misnomer, the writ is amendable on mere motion accompanied by an affidavit of the right name, under section 14 of chapter 125. Such plea could not have been filed without having first made the writ a part of the record by demanding *oyer* thereof: 4 Minor's Institutes, 1266; 5 Robin's Practice, 98; Hogg's Pleading and Forms (W. Va.), 166, No. 8; Stephens v. White, 2 Wash. (Va.) 212; Watson v. Lynch, 4 Munf. 94. To have availed itself of the plea in abatement, *oyer* of the writ must have been had and the plea in abatement filed before any other plea was put in. A plea in abatement raises the question of jurisdiction, and after a general appearance, the jurisdiction of the court for want of sufficient process cannot ordinarily be raised: 4 Minor's Institutes, 1266. Objections which do not go to the substance of an action are treated as waived, if not made when the occasion of them arises. "It is a well-established rule that by appearing and pleading to the action a defendant waives all defects in the process or the service thereof. The cases go further and imply such a waiver from the defendant's taking or consenting to a continuance as fully as they do from his pleading to the action. The object of the writ is to apprise the defendant of the nature of the proceeding against him. The fact of his taking or agreeing to a continuance is evidence of his having made himself a party to the record, and of his having recognized the case as in court. It is too late for him afterward to say that he has not been regularly brought ¹⁵² into court": Harvey v. Skipwith. 16

Gratt. 410. By appearance to the action for any other purpose than to take advantage of the defective execution or nonexecution of process, a defendant places himself expressly in the situation in which he would be if process were executed upon him: *Mahany v. Kephart*, 15 W. Va. 609; *Bank of the Valley v. Bank of Berkeley*, 3 W. Va. 386; *Chilhowie Lumber Co. v. Lance & Co.*, 50 W. Va. 636, 41 S. E. 128. Had all these dilatory steps been taken by the defendant, they might have been unavailing even under adverse rulings of the courts, for many decisions hold that it is unnecessary to append the descriptive words "a corporation": See *Gillett v. American Stove Co.*, 29 Gratt. 565, in which both writ and declaration omitted the words, but were held good; *Woolf v. Steamboat Co.*, 62 Eng. Com. L. 103; *Norris v. Statts*, Hob. 110; *Henriques v. West India Co.*, 2 Ld. Raym. 1534; *Reese v. Baird*, 5 Rand. 326, 15 Am. Dec. 755; *Douglass v. Kanawha etc. Ry. Co.*, 44 W. Va. 267, 28 S. E. 705; *Dry Fork R. R. Co. v. State*, 50 W. Va. 235, 40 S. E. 447; *Baltimore etc. R. R. Co. v. Sherman*, 30 Gratt. 602. In *Woolf v. Steamboat Co.*, 62 Eng. Com. L. 103, and *Norris v. Statts*, Hob. 110, it was said that the name argues a corporation and that setting it forth impliedly amounts to an allegation that the defendants are a corporate body. The view has been adopted and is still adhered to both in Virginia and this state: *Gillett v. American Stove Co.*, 29 Gratt. 565, and *Dry Fork R. R. Co. v. State*, 50 W. Va. 235, 40 S. E. 447. It is inferred from the absence of anything in the brief in support of this assignment of error that it has been abandoned. At any rate, it is clear that there is nothing in it.

The criticism of the declaration is that it fails to show that the defendant violated any duty which the company owed to the plaintiff. It alleges that the defendant owned, controlled and operated a gas-well near the public highway, and that it was its duty to use due care in managing and operating said gas-well and in blowing the same off so as not to interfere with the lawful use of said highway by persons riding and driving thereon, but that it neglected to do so. It also avers that the plaintiff, on the twenty-eighth day of April, 1897, was, as a teamster, driving his team upon and over said highway, hauling oil-well supplies, merchandise, hay, etc., in a wagon drawn by two horses driven by him, and when he, with his team, came to a point on said highway, near to the said gas-well, said defendant, through its agents, servants and employes, then and there in charge of said gas-well, not regarding its duty in the premises,

carelessly and ¹⁵⁸ negligently managed and operated said gas-well, and so carelessly and negligently caused and permitted the gas from said well to be discharged and escape with great force and in large quantities into the air, making a loud, hissing, unusual and frightful noise, calculated to frighten horses and cause them to run away, and which did then and there frighten said horses so driven by the said plaintiff, and caused said horses to become unmanageable and run away, whereby the said plaintiff was thrown, etc.

Although the well was owned by the defendant company, and was purely private property, the use of that property by the defendant is restricted by the law so far that it cannot be, either by negligence or wantonness, so operated or handled as to inflict injury upon persons or their property. The operation of a gas-well is in no sense unlawful, and as it is necessary to relieve the well of the accumulation of water by opening the gate and allowing it to blow out, this operation is also lawful and cannot be regarded as a nuisance per se. But it is well settled that a business or transaction which is in itself lawful may be so used or so conducted as to become a nuisance and make the owner liable for injury resulting therefrom. So a man may make lawful use of his property, but if he is so negligent and careless in the use thereof as to inflict injury upon others, he must answer in damages.

It is a principle vital and indispensable in organized society that everyone must so use his property as not to injure others. Although he has the right to the exclusive dominion and enjoyment of his own property, and may do with it as he pleases, he must respect the lives, limbs, health and property of others to the extent of exercising at least ordinary care for their safety in the use of his property. Such right of dominion and enjoyment in him is met and limited by the same right existing in other people. He must live and let live. He owes a duty to the other, and he must so use his own property as not to injure him. At least, negligence or willful misconduct on the part of the one in the use of his own property resulting in injury to the other makes him liable: *Powell v. Bentley etc. Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035; *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936. The cases of *Dicken v. Liverpool Salt etc. Co.*, 41 W. Va. 511, 23 S. E. 582, *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329, 32 Am. St. Rep. 859, 15 S. E. 81, 16 L. R. A. 271, and *Poling*

v. Ohio River Ry. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215, relied ¹⁵⁴ on by the plaintiff in error, do not support its contention. The language quoted from the first: "A party who is using his own property in a lawful way cannot be guilty of a breach of duty to anyone," implies that he has not been guilty of negligence or willful misconduct in the use thereof, and in all those cases it was determined by the processes of the law that there had been no negligence.

This principle is very well illustrated in a line of decisions which hold that, although it is lawful for a manufacturing establishment to maintain a steam whistle, that whistle must be used with ordinary care and due regard for the rights of others, and if, by the negligent use thereof, horses are frightened and caused to run away and inflict injury, the owner of the plant is liable for the resultant damages. Between these cases and the one now under consideration, there is a very close analogy. The principles upon which they stand are well established by courts of high standing, as well as supported by fundamental principles of law, and their application to the facts of this case as set forth in the declaration makes it clearly good.

"The use of a steam whistle in a manufacturing establishment is not a nuisance per se, but it may be used so as to become such. It has been held that the sounding of the steam whistle of a factory fifteen feet from the platform on which a team is being unloaded is gross negligence which will render the factory owner liable, where the person in charge of the team is not first warned by the employes in charge of the whistle, although the whistle is in plain view from such platform and the owner of the team, while acquainted with its operation, fails to notify his driver thereof. If a horse, frightened by such whistle, pulls at the rope by which he is hitched, and is thereby killed, the proprietor of the establishment using the whistle will not be liable to pay damages, in any event, if it appear that the accident was the combined result of the noise of the whistle and the vicious habit of the horse": 1 Thompson on Negligence, sec. 1261.

In Knight v. Goodyear etc. Mfg. Co., 38 Conn. 438, 9 Am. Rep. 406, Butler, C. J., said: "Their right to use a whistle must be conceded, but like all other rights it must be so exercised as not to endanger and injure others. It is no answer to say that they did not erect or blow the whistle for any such purpose, or that they had no knowledge that it frightened horses, or that they did not suppose it was calculated ¹⁵⁵ to frighten them.

These facts, if they existed, they were bound to know or anticipate."

The court refused to give an instruction asked for by the defendant, telling the jury that if the plaintiff, knowing the danger of approaching the gas-well, and having reason to anticipate danger, not dependent upon natural causes, but likely to happen by reason of the defendant operating its gas-well, and having knowledge of the injury, approached the well, he was guilty of contributory negligence and could not recover unless defendant's agent let off the gas with intent to frighten the horses. It is insisted that this instruction should have been given. As the plaintiff was proceeding along the public highway where he had the right to be, and the gas-well had not yet been opened, he was not bound to assume that it would be opened while he was passing. He admits in his testimony that he saw Little approaching the derrick, and from this fact it might have been inferred that Little intended to open the well, but as plaintiff was already in the occupancy of the highway, the team already in close proximity to the well, where the noise, which the witnesses say was about five or six times as great as that of an ordinary locomotive whistle, was likely to frighten his horses, he was not bound to assume that the defendant's agent would do a negligent and reckless act. He had the right to assume that the agent would perform his duty and obey the law, by waiting until after the team had passed. All the evidence bearing on the question is to the effect that the plaintiff was so near the well when he saw Little going to it as to make his position dangerous, if the well should be opened. Can it be said that because he did not turn back and fly from the mere prospect of such danger he was guilty of contributory negligence? The groundlessness of this contention is too apparent to require the citation of any authority.

On the motion to set aside the verdict, which the court overruled, it is argued that there was no proof of the ownership of the well by the defendant company. Throughout the entire trial, with the exception of a single question propounded by counsel for the defendant, the defendant company was never referred to by either counsel or witnesses by its full name. For the most part, it was called "the Philadelphia Company." The ownership of the well was not controverted nor was there even a suggestion or intimation throughout the whole trial that the defendant company ¹⁵⁶ did not own and operate it. The plausible suggestion that the trial proceeded upon the tacit admission of the defendant's ownership of the well need not

be adopted, if it could be. There seems to be enough evidence in the record to warrant the finding of the jury upon that point. In the testimony of a witness for the defendant, the following is found:

"Q. Are you acquainted with the oil-well on what is called the Barr farm, in this county, belonging to the Philadelphia Company of West Virginia, or gas-well? A. Yes, sir.

"Q. Do you remember the time that Robert Snyder was injured by falling off of a wagon near that well? A. I recollect of hearing of it.

"Q. Do you know anything about the condition of the road as to bushes along the edge of it at that time, between the road and the well? A. Yes, sir."

The witness then proceeds to describe the location. Clearly, he testified to that well as belonging to the defendant company and identified it as the well near which the defendant was hurt. As there is no evidence to the contrary, this is sufficient upon which to rest the verdict as to the ownership of the well, and, on that ground, the verdict cannot be set aside. Had there been no admission of ownership by the defendant or proof of it by his own witnesses and no proof of it by the plaintiff, the verdict would have to stand upon the tacit admission of ownership or else be set aside, but proof of it by the defendant relieves the court of the duty of saying whether it can stand upon the implied admission.

Further argument on the motion to set aside the verdict is based upon the theory of contributory negligence on the part of the plaintiff, it being contended that, as the plaintiff knew the location of the well and saw the defendant's agent there, and continued to advance to a point within eighty-two feet of the well, without warning the agent not to open it, and without doing anything else by way of precaution against danger, he took upon himself the risk and cannot be heard to complain of the result. This proposition has been sufficiently discussed in passing upon the instruction. The testimony further shows that, although the horses became frightened and ran, the wagon was not overturned nor the load thrown off, and that shortly after it had started one of plaintiff's lines broke and he fell from the wagon.

Upon these facts it is insisted that the injury was due to the breaking of the line, and that as the plaintiff, in his business of hauling, was accustomed to driving through a community in ¹⁸⁷ which there were numerous gas-wells, many of which

were often opened and blown out, it was his duty to provide himself with safe and sufficient lines with which to control his team. This position is untenable, for the reason that the weak condition of the line cannot be regarded as having been the proximate cause of the injury. "Where the alleged intervening cause is in reality only a condition upon or through which the negligent act operated to produce the injuries complained of, the defendant will be held liable": 21 Am. & Eng. Ency. of Law, 494. The excitement of the horses caused by the blowing off of the gas-well must be regarded as the cause of the injury, not the weak condition of the line through which that cause operated, even if it be conceded that the fall was the result of the breaking of the line and not of the jolting or toppling of the wagon, resulting from the running of the horses. The jury had the right to infer that, but for the negligent act of the defendant, the line, although weak, would not have broken. This principle is illustrated in 1 Thompson on Negligence, section 91, as follows: "A is passing along the street in his chaise, when the dog of B leaps at the horse; the horse takes fright and becomes unmanageable; in endeavoring to restrain him, a rein is broken; in consequence of this, the chaise is dashed against a post and broken. The attack of the dog, and not the breaking of the rein, is the proximate cause of the injury. . . . A street-car is running at an unlawful rate of speed, in consequence of which it strikes a dray, breaks its shaft and causes the horse to run away. The driver, while endeavoring to secure the horse, is struck by the broken shaft and hurt. The unlawful act of the street railway company is the proximate cause of his injury. A horse is allowed to run at large on a public street, in violation of a municipal ordinance. A man is driving a mare along the street, and her colt is running along by her side; the horse chases the colt; this frightens the mare so that she runs away, and both the mare and colt are injured. The owner of the mare and colt has a right of action against the owner of the horse for the damage thus produced."

The proximate cause is not always that which is nearest in time or place to the injury. The meaning of the maxim, "*Causa proxima non remota spectatur*," is that the true cause of an injury is that which brings it about either by direct operation or ^{and} by setting in motion other causes as instruments or agents operating under its dominant influence. The proximate cause is the superior or controlling agency as contradistinguished from

those causes which are merely incidental or subsidiary to such controlling or principal cause. Phillips on Insurance, section 1093, says: "If two causes conspire and one must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe." At section 1132 the same work says: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, Martin, C. J., said: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." These principles are approved in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395. In *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65, the same principle is applied, in a case in which the property insured was destroyed by fire which originated from an explosion in a building other than that in which the insured property was. By the policy, loss by fire which might happen by means of an explosion was excepted, and the court held that the insurers were not liable. In the opinion, Mr. Justice Miller said: "The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning." Though these principles are announced in insurance cases, it has already been shown that the courts apply them to negligence cases in seeking the cause of an injury. Whatever the form of action or relation of the parties may be, those principles remain the same. An additional illustration is a negligence case found in *St. Louis etc. Ry. Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472, where a person almost blind, having taken a seat in a passenger-car which had been put in place to receive passengers, was killed on the platform by another car approaching from the rear in attempting to escape, while other passengers succeeded in avoiding ¹⁵⁹ injury by getting off. The court held that the fact that the intestate was almost blind did not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury. The reason given was that "his blindness was

not the juridical cause of his injury, but only a condition that made it possible."

Under the impression that such an objection could be raised by motion to set aside the verdict or to arrest the judgment, it is insisted in the brief that there is no proof that the well is located or that the injury occurred in Wetzel county, and further, that it is not shown in what district or particular locality the cause of action arose. The exact place is not material in any aspect of the case: 1 Chitty on Pleading, 394. It need not be either alleged or proved. The county in which it occurred is material and it is necessary to allege it. In other words, the venue must be laid in the declaration. But it does not follow that the judgment cannot stand because there was no proof that the cause of action arose in the county named in the declaration. In an action of this kind, the county is important only as bearing upon the question of jurisdiction, and an objection to the jurisdiction, where the declaration shows jurisdiction on its face, cannot be raised by mere motion. "Where the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for the want of such jurisdiction shall be allowed, unless it be taken by plea in abatement": Code, c. 125, sec. 16. The defendant cannot allow the action to proceed through trial and verdict to judgment and then complain that the cause of action did not arise in the county in which the venue is laid. If he proposes to contest the jurisdiction of the court on that ground, he must give notice of it by plea in abatement. In *Osborne v. Taylor*, 12 Gratt. 120, the jurisdiction depended upon a question of fact to be decided by the court, namely, whether certain slaves, necessary parties to the bill, had been emancipated. No plea of the jurisdiction had been filed, and the court held that the statute applied and prevented the making of the objection to the jurisdiction for the first time in the appellate court. In *Washington etc. Tel. Co. v. Hobson Co.*, 15 Gratt. 122, it appeared on the trial that some of the defendants resided out of the state and it was held, under the statute, that, ¹⁶⁰ even if this were good ground for objection to the jurisdiction of the court, it was no excuse for arresting the judgment, as, to be available, it must have been set up by plea in abatement. In *Beckley v. Palmer*, 11 Gratt. 625, and *Hudson v. Kline*, 9 Gratt. 385, where objections to the jurisdiction in equity were sustained at the hearing, the reasoning of the court indicates that they were sustained simply because the bills on their faces showed want of

jurisdiction. Had it been otherwise, the statute would have applied. For further illustration of the application of the statute in analogous cases, see *Bank of the Valley v. Gettinger*, 3 W. Va. 309; *Middleton v. White*, 5 W. Va. 572; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582. But if this were not true, there is enough evidence to warrant the finding, as will be seen by reference to the testimony quoted, concerning ownership of the well.

Upon the whole case, the conclusion is that there was no error and the judgment should be affirmed.

DISSENTING OPINION.

BRANNON, J. What duty to the plaintiff did defendant break? None. Therefore, there can be no recovery by law. The defendant did only a lawful act in its business. The accident falls within the pale of inevitable misfortune. It is a case of *damnum absque injuria*. No negligence or wrong is shown, no violation of duty. Taking the case as shown by the plaintiff's evidence, there is no law to support the verdict. It is against law: *Veith v. Hope Salt etc. Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

UPON PETITION FOR REHEARING.

POFFENBARGER, J. In disposing of the assignments of error, it was deemed unnecessary to review the evidence which is conflicting in the petition for rehearing—lack of evidence of negligence is urged—great stress being laid upon the fact that Little, the agent of the company, says he looked for teams and persons passing upon the road before he opened the well, but saw none. But this testimony does not conclude the question whether there was an exercise of due care. The plaintiff testifies that he saw a man in the derrick, and that he was on high ground and only about a ¹⁰¹ hundred feet distant from the well when it was opened. W. C. Edwards, a disinterested party, says Snyder stopped his team on top of a rise in the road a short distance from the well, and that Little could have seen him if he had looked. Being further questioned on this point, he reasserted his positive belief that a man, standing in the derrick, could have seen Snyder's team at the point at which the team was stopped to allow the witness Edwards to pass. W. O. Gallaher, who was with Edwards, testified as a witness for the defendant that Snyder's team stopped at a point fifteen or twenty feet from the top of the rise in the road, and that a

man on top of the load could see the derrick from that point, and that a man in the derrick could, in his opinion, have seen the team if he had looked carefully. It further appears from the evidence that on the ground between the well and the point at which the team was there was some growth of weeds or brush, or of both, by reason of which the view may have been slightly obstructed. In this state of the evidence the questions whether the agent could have seen the team and whether he performed the duty of looking for passing teams before opening the well were clearly proper for the jury, and such as the court cannot pass upon without improperly interfering with the functions of the jury in the trial of the case.

The Doctrine of Proximate Cause is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 86 Am. St. Rep. 807-861. The proximate cause is not necessarily the last act or nearest act to the injury: *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441. Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause: *Cincinnati etc. R. R. Co. v. Worthington*, 30 Ind. App. 668, 96 Am. St. Rep. 355; *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292; *Chattanooga Light etc. Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844. In *Knight v. Goodyear's Rubber etc. Co.*, 88 Conn. 498, 9 Am. Rep. 406, the owner of a factory situated near the highway is held liable for injuries sustained by a traveler whose horse is frightened by the blowing of the factory whistle.

HAZELTINE v. KEENAN.

[54 W. Va. 600, 46 S. E. 609.]

NOTE PAYABLE TO "ATTORNEY"—Negotiability.—If a note is made payable to "L. H. Keenan, attorney," and is indorsed by him in like style, the purchaser is put upon inquiry. (pp. 955, 956.)

AN ATTORNEY'S Retaining Lien on the Papers of his client for services depends on his possession of the papers and ceases when he voluntarily parts with them. (p. 957.)

Scott, Cobb & Maxwell, for the appellants.

Harding & Harding and W. B. Maxwell, for the appellee.

BRANNON, J. Hazeltine, L. H. Keenan and Wilson together effected a sale to Patterson of some timber belonging to Caplinger, the price being two thousand five hundred dollars, of which two thousand dollars was paid Caplinger by Patterson, and five hundred dollars was profit to Hazeltine, Keenan and

Wilson, and for this balance Patterson made two promissory notes, one for two hundred dollars, and one for three hundred dollars, purporting to be negotiable, payable on their faces to "L. H. Keenan, attorney." Before maturity of the notes L. H. Keenan transferred one of them to his father, by an indorsement reading "Transferred the within note to Thomas G. Keenan, L. H. Keenan, Atty."; and the other he transferred to his brother by similar indorsement. Judgments were obtained on them in the names of indorseees against Patterson, and in two cases of Ward and Brown, Trustees, v. Patterson, and Nalle v. Patterson, in Randolph, a joint decree was rendered subjecting property to the payment of Patterson's debts. These judgments were decreed to be paid to said indorseees out of a fund in the hands of a trustee realized by a sale of Patterson's property under the decree. After this decree Hazeltine filed what is styled a petition in the case claiming that he was owner of one-third of the debt represented by said notes, and that their transfer by L. H. Keenan to his father and brother was invalid and made to defraud said Hazeltine; that nothing was paid for such transfers, and at their date said indorseees well knew that the notes were not the property of L. H. Keenan, as their faces imported that they were the property of other parties, and only executed to Keenan as attorney. The petition asked that Hazeltine be paid out of the fund in the hands of the trustee under the control of the court one-third of said notes. A decree was made giving Hazeltine one-third of the amount of said notes, and from it T. J. Keenan and T. G. Keenan appeal.

The right of Hazeltine to one-third of the debt represented by the notes is clearly established by the evidence, as the circuit court found on the evidence. It is scarcely contested here. But appellants contended that they are bona fide holders for value of negotiable paper, and no matter if Hazeltine had an ⁶⁰² interest in the notes, it is not good against them. The notes are payable to Keenan as attorney, and so they were indorsed by him. Does the word "attorney" detract from their negotiability? If it derogates from their currency or negotiability, if one buying them is by that word warned of rights of others, and is put on notice of their rights, and therefore cannot say he is a holder without notice of defect of right in the indorser, then the notes cannot be negotiable. In *Third National Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304, a note payable to the order of one as "trustee" was held not negotiable. The court said the trustee restricted its free circulation. But whether

negotiable or not, the authorities say that when the word "trustee," "guardian" or any word suggesting rights in others is upon a note, it puts a purchaser on inquiry, and he purchases subject to the just rights of others, and does not hold the place of an innocent purchaser. In the case just cited the court said: "In the case of the present note it cannot be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank before purchasing it to have made inquiry into the right of the trustee to dispose of it," and quoted from Story's Equity, section 400: "Whatever is sufficient to put a party on inquiry is in equity held to be good notice to bind him." In *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, a stock certificate was in the name of one as "trustee." The court said: "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustees' after the name of stockholder does not indicate and give notice of a trust." "Express notice is not indispensable. There may be evidence of the infirmity of the paper apparent on its face, or such indications as put the purchaser on inquiry": 1 Daniel on Negotiable Instruments, sec. 795a. In section 271 that author says that the better opinion is that though a fiduciary may pass good title, if the transfer is in execution of the trust, yet if there is suffixed to the payee's name "such words as 'trustee,' etc., they put the indorsee upon inquiry as to the title, and if the transfer be in fraud of the trust, the indorsee must suffer the consequences."

The words "Agt. Glass Buildings," added to a signature to a check, are enough to put one receiving it in payment on inquiry ⁶⁰³ as to the signer's authority to use the fund to pay his debt: *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. If the word "trustee" is on the face of the note, that compels the purchaser's "ascertaining whether the trustee has power to sell": *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149, 38 L. R. A. 837. The word "trustee" is notice of a trust and calls for inquiry and examination: *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, and note. An indorsement by "A, B, syndic," put the purchaser upon notice: *Nicholson v. Chapman*, 1 La. Ann. 222, cited in 2 Randolph on Commercial Paper, sections 1010, 1012, under the proposition that "where paper is held by a trustee or guardian, and this appears on its face, it will put the purchaser on inquiry as to the authority and title of such officer." "The fact

that the instrument on its face is made payable to a person in his fiduciary capacity is notice that the payee is acting in such capacity, and that he can only give title or deal with such instrument for the benefit of the person whom he represents": *Eaton & Gilbert on Commercial Paper*, sec. 75, cl. d, p. 370. "Where a bill or note is indorsed by a person in an official capacity, as guardian, syndic, or trustee, the purchaser is put upon inquiry": 4 *Am. & Eng. Ency. of Law*, 2d ed., 305. An attorney at law or in fact is but an agent. He cannot sell his client's paper, especially, as did the party in this case, for his own private use: 3 *Am. & Eng. Ency. of Law*, 369. The party might collect from the debtor, but not sell. An objection is made to the decree because the petition was filed after final decree—too late to file a petition or a bill of review. Of course, it is not a bill of review, as it is not filed by a party, and does not seek a reversal for law error or on new evidence. No matter what it calls itself. We look to its matter. The fund was in court. Is it possible that one claiming an interest in it could not petition the court to give it to him according to his right? How else could he get it? The fact that the fund was in court justifies what is usually termed a petition, because it is an application to the court. In so far as the interests of the defendants are concerned, they were made parties, given right to defend, and we may call it an original bill to overthrow or modify their rights under the decree. If it were to rehear on the same matters, a stranger can come in by petition and ask a rehearing: *Heermans v. Montague* (Va.), ⁸⁰⁴ 20 S. E. 899. But as it is on matter not in the record, I regard it a bill to affect the decree, an original bill to impeach or change a decree, and not too late.

As to the point that the decree does not fix out of which note Hazeltine should be paid: What has he to do with that? Both notes made one solid debt as to him, in which he had an undivided share. He had right to payment out of the fund, regardless of rights of appellants as between themselves. He did not have to settle their equities. Moreover, the indorsements of the two notes seem contemporaneous.

I will add, as pertinent to what is said a few lines back as to the contention that a petition does not lie in this case because the decree is final, that the fund is in court subject to its control. The design of Hazeltine is not to complain of the matters involved in the suit and the decree on them, but merely to vary the decree as to the disposition of that fund, and he

intervenes only to say that he has a share, though decreed in the name of Keenan, and begs the court to vary the decree as to the disposition of that fund. The Virginia case cited above is ample authority to justify the petition; but I will add that Story's Equity, sections 429, 430, allows a bill not only to enforce a decree already rendered, but to modify or vary it.

Keenan claims that Hazeltine agreed that the latter's share in this Patterson deal, so called in the case, should be applied to pay fees to Keenan as attorney in litigation of a firm called Hazeltine & Hall, and, perhaps, some litigation of Hazeltine individually. In the first place, whilst Keenan so swears, Hazeltine swears to just the opposite, and the circuit court has passed its verdict on conflicting evidence, and we cannot overrule that verdict. In the second place, and this is very important, Keenan's claims for such fees are of the most general, indefinite character. He files no specification to say what cases they were in which such fees arose; what cases were those of Hazeltine & Hall, what cases were those of Hazeltine alone, nor what were his fees in such cases, respectively. How can the court see whether Hazeltine's share in this case equals, is less or greater than those fees? True, Keenan swears that Hazeltine agreed to apply his share on these fees, and that fees would be still left unpaid; but this is a general, indefinite statement. In the third place, Keenan wants to charge Hazeltine individually with fees against ⁰⁰⁵ a firm. They would not be chargeable as a setoff, without express agreement. The burden of proof for this is heavy on Keenan, and the evidence of man against man defeats it. It has been suggested that without evidence the law itself gives Keenan a lien for those attorney fees upon the fund. This lien cannot be supported. It cannot be what is called a charging lien, because the notes constituting the fund were not recovered in a suit by Keenan, and for this reason he has no charging lien: *Fowler v. Lewis*, 36 W. Va. 113, 14 S. E. 447. But it is claimed that Keenan has another kind of lien as attorney—that is, a retaining lien, to secure all and any attorney's fees in any cases. To this a definite answer is given by Jones on Liens, section 128: "This lien is lost by the attorney's voluntary surrender of the papers to his client; for possession is indispensable to the lien. The lien is lost when the attorney has parted with the possession of the papers by his own act, even though this was a mistake on his part." This retaining lien is like the common-law lien discussed in *Burrough v. Ely*, 54 W. Va. 118, ante, p. 926, 46 S. E. 371, of a sawyer on lum-

ber sawed by him. The very life of the lien depends on the continued retention of the article, because the lien is in terms and nature a thing fastening itself on the very thing itself. In this case Keenan, by his own voluntary act, transferred these notes and gave up possession of them.

Therefore, we affirm the decree of the circuit court.

Justice Dent Dissented, and in passing on the merits of the controversy, said: "It appears from the evidence, which is somewhat conflicting, that the fraud charged in the petition is wholly without foundation; that Hazeltine knew of the assignment of the notes made by L. H. Keenan, and was present without making objection thereto, when the assignees obtained judgments on the notes; that Hazeltine & Erb and Hazeltine & Hall were indebted to L. H. Keenan for legal services rendered in an unsettled amount, which Keenan claims will much more than cover the amount in controversy; that Hazeltine individually was under obligation to pay these fees, and that Hazeltine and both the firms were insolvent. It is true that Hazeltine claims he is able and willing to pay these fees when properly ascertained, yet when interrogated as to the solvency of the firms, which necessarily involves the solvency of the individuals thereof, he refuses to answer. The proof otherwise in the case undoubtedly establishes insolvency. Partnership debts are both joint and several, and the individual partner and his property is liable for the payment thereof: *Lee v. Hassett*, 41 W. Va. 379, 23 S. E. 559; 2 Tuck. Bl. Com. 141; *Courson v. Parker*, 39 W. Va. 524, 20 S. E. 583. Such being the case, L. H. Keenan, without even the assent of Hazeltine, had a lien on the notes in controversy as long as they were in his possession and control, to secure the payment of attorney's fee owed by Hazeltine individually or as a partner with some one else, as all partnership obligations are both joint and several: *McCoy v. Jack*, 47 W. Va. 201, 34 S. E. 991; 3 Am. & Eng. Ency. of Law, 2d ed., 454. A court of equity will not interfere to deprive an attorney of such lien, especially when the client has consented that the attorney should collect and disburse the proceeds of such notes, and when he would have the right to apply such proceeds to the payment of his fees. The notes, though assigned, are shown to be still under the control and in custody of Keenan.

"The petition in this case is in the nature of a bill for specific execution of a verbal arrangement regarding the pecuniary transaction, and the petitioner having failed to show fraud, insolvency or any other just cause for equitable interference, but it appearing that there exists a doubtful controversy as to the ownership of the fund the parties should be remitted to their legal remedies. The only real question in controversy between the parties is the determination of

the amount of the attorney's fees, and there appears to be a suit already pending for this purpose.

"The decree should, therefore, be reversed and the petition dismissed without prejudice to the legal rights of the parties."

A Promissory Note payable to a named person, "trustee," is not rendered non-negotiable, according to the weight of authority, by the use of the word "trustee," such suffix being merely descriptio personae: *Central State Bank v. Spurlin*, 111 Iowa, 187, 82 Am. St. Rep. 511, and note.

An Attorney may have a retaining lien on the papers of his client, but it is dependent upon his possession of them: See the monographic notes to *Andrews v. Morse*, 31 Am. Dec. 759; *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 251.

WALDRON v. HARVEY.

[54 W. Va. 608, 46 S. E. 603.]

PLEADING.—A Decree Which has No Matter in the pleading to rest upon is void. (p. 963.)

PARTITION—Sale for Costs.—In a Suit Purely and Only for Partition, there can be no sale except for the reason that the land is indivisible; a sale for costs is void. (p. 964.)

PLEADING.—In a Suit for One Purpose there can be no decree for another. (p. 964.)

PLEADING.—Under a Prayer for General Relief, relief not specially asked for may be had, if the facts alleged and the nature of the case warrant it, but not otherwise. (p. 964.)

PLEADING.—A Court of Equity having Jurisdiction for One Purpose may give full relief, but that is where the nature of the case and the facts given in the bill justify it. (p. 964.)

PARTITION.—A Decree in Partition Disposing of everything involved in the suit is final, and puts the case out of court, and after the term the powers of the court are closed. (p. 965.)

MARRIED WOMEN.—A Decree to Sell in Fee the Land of a Married Woman, not her separate estate, for a debt made during coverture, is void in West Virginia; and so is a decree selling in fee her separate estate for a debt made during coverture and before chapter 3, Acts of 1893, Code of 1899, chapter 66, section 15. (p. 965.)

JUDGMENT—How Attackable.—A Void Decree may be reversed on appeal or bill of review, or attacked collaterally. (p. 966.)

PARTITION—Parties.—A Trustee and a Creditor are not necessary parties in a partition suit, unless a sale is asked. (p. 966.)

MARRIED WOMEN—Estoppel to Assert Title.—A married woman cannot lose her title to land, whether or not it is separate estate, by estoppel in pais. (p. 966.)

MARRIED WOMEN—Estoppel to Assert Title.—An admission by a married woman in a conversation that another person owns her

land, which is a mere mistaken opinion, not misleading anyone to outlay, cannot pass the title. (p. 966.)

MARRIED WOMEN.—Laches cannot be Imputed to a married woman to defeat her right to land not her separate estate. (p. 966.)

LACHES—Loss of Title by—Possession.—Laches is not imputable to persons in possession of land, where the adverse claimant is not in possession. (p. 966.)

LACHES.—If the Statute of Limitations does not bar the legal title to land, laches cannot. (p. 967.)

ADVERSE POSSESSION.—A Deed Under a Void Decree purporting to pass the owner's title gives color of title to support adverse possession. (p. 968.)

ADVERSE POSSESSION of a Married Woman's Land not her separate estate may bar the joint right of herself and husband thereto during coverture, but she and those claiming under her have five years after coverture ends in which to sue for the land. (p. 968.)

TAXES PAID by a Purchaser Under a Void Decree inure to the benefit of the former owner to prevent forfeiture by his nonentry for taxes. (p. 969.)

CLOUD ON TITLE.—One in Possession of Land may sue in equity to have a cloud on the title, arising from a void partition decree and sale, removed. (p. 969.)

VOID JUDICIAL SALE.—A Purchaser from a Purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. (p. 969.)

John W. English and Robert H. Hoyle, for the appellant.

John B. Wilkinson and Thomas H. Harvey, for the appellees.

⁶¹⁰ **BRANNON, J.** George W. Clark died in 1861 owning a large tract of land in Logan county. In 1885 M. H. Waldron and Hester A. Waldron, his wife, filed a bill against Luemma Clark and others in the circuit court of Logan county, stating in it the death and ⁶¹¹ seisin of Clark, that he left a widow, Luemma Clark, and three children, Hester A., John B. and Jane Clark; that Hester A. Clark had married M. H. Waldron, and Jane had married ——— Waller, and died leaving one child, George R. Waller. The bill prayed that the widow's dower be assigned and the land divided between the three heirs. The bill contained the common prayer for general relief. A decree was made at April term, 1886, assigning the widow's dower, and assigning to Hester A. Waldron, John B. Clark and George R. Waller each a separate parcel of the land, and requiring each heir to pay a third of the costs, and retiring the case from the docket. U. S. Buskirk gave a notice to the parties to the suit, saying that he was the beneficiary of the several parties entitled to costs in the case, and that he would at the October

term, 1886, move the court to reinstate the case on the court docket. At that term an order was entered reciting that as at the April term, 1886, the cause was dropped from the docket without any provision for payment of costs, "on motion of the plaintiff this cause is ordered to be reinstated upon the docket of this court, that an adjudication and proper process may be had for the costs herein." At the same term another decree was made reciting that the former decree had required Hester A. Waldron, J. B. Clark and George R. Waller to pay the costs equally, and fixing the amount of costs, and decreeing that unless said parties should pay the costs and interest, a special commissioner should sell sufficient of the land which had been set apart to said heirs to pay the costs chargeable to them, respectively. Under this decree ninety-nine acres of the tract which had been allotted to Hester A. Waldron was sold and purchased by J. A. Nighbert, and the sale confirmed by decree. Nighbert's right passed to Thomas H. Harvey, S. S. Altizer, Nicie Nighbert and G. F. Miller. By deed of trust, September 17, 1883, M. H. Waldron and Hester A. Waldron, his wife, and John B. Clark conveyed to William Stratton, as trustee, to secure a debt to James A. Nighbert, all their interest then undivided in the land descended to them from George W. Clark. In a suit to enforce liens against John B. Clark a decree was made to sell John B. Clark's tract allotted to him, and in this suit the said trustee and Nighbert were parties, and under the decree the tract of John B. Clark was sold and bought by Nighbert by decree. That suit was brought and the sale under ⁶¹² it made before the sale to Nighbert of the ninety-nine acres out of Hester Waldron's land. The John B. Clark land bought by Nighbert adjoins said ninety-nine acres. When Nighbert purchased the John B. Clark land he at once took possession of it, and yet has such possession; but his possession actual includes no part of the ninety-nine acres. Before George W. Clark's death he allotted a portion to Hester A. Waldron, and she and her husband took actual possession of it, built a house upon it, and have ever since been in actual possession, and the part assigned to her in the partition included this improvement, and ever since such partition they have continued such possession. The ninety-nine acres sold from her is part of the tract assigned her, and adjoins the remainder of her tract; but she has never had actual possession within the ninety-nine acres, if we can give it a boundary. The said ninety-nine acres seems to have no definite boundary. The decree under which

it was sold prescribes no definite boundary, simply tells the commissioner to sell a sufficient amount of land to pay the debt. The said ninety-nine acres was, for taxation, deducted from Hester A. Waldron's tract, and ever since Nighbert's purchase of it the ninety-nine acres has been taxed to Nighbert and those claiming under him, and not to Hester Waldron. The sale to Nighbert of the John B. Clark land paid the deed of trust, but it was not actually released until after the sale of the ninety-nine acres under the decree. The said ninety-nine acres is in a state of nature. In the year of 1900 Waldron and wife brought a chancery suit in the circuit court of Mingo county, wherein the land now lies, against Thomas H. Harvey and others owning the ninety-nine acres under Nighbert's purchase under said judicial sale, basing their claim to relief on the theory that the decree of sale, and the sale and confirmation decree were all void, and conferred no title, because the court was without jurisdiction to make the decrees, and praying that said decrees and sale and deed under them be set aside as clouds upon the title of Hester Waldron. The court entered a decree denying any relief to Waldron and his wife, and dismissing their bill, and from this decree they have appealed.

One important question is this: The bill for partition was purely and only a bill for partition. It stated only the facts that Clark owned the land at his death, his title, who were his heirs, ⁶¹³ and that they were entitled to partition. It asked nothing as to costs; did not pray that they be charged on the land, and that the land be sold for them. The utmost the court could do on that bill was to divide the land, order each party to pay his share of cost by personal decree, and perhaps, as some courts do, declare such costs a lien on the lands assigned, which would be unnecessary, because the decree personal would be a lien. This decree did not declare the costs a lien. If it had done so, there could not be a sale for costs on that bill. The decree that the heirs pay costs was a judgment. It had to be enforced by another bill, because it did not exist at the date of the suit, and the bill made no allegation as to its payment, and made no statement or prayer as to costs or their non-payment. There had been no execution for such costs. It was not a judgment lien suit; it did not seek a sale of the land for any cause. "A decree is a conclusion of law from pleading and proofs, and where there is a failure of either pleading or proofs there can be no decree": *Kenneweg v. Schilansky*, 47 W. Va. 287, 34 S. E. 773; *Vance Shoe Co. v. Haught*, 41 W. Va. 275,

23 S. E. 553. A decree, or any matter of a decree, which has no matter in the pleading to rest upon is void, because pleadings are the very foundation of judgments and decrees. "Matters not charged in a bill or in the answer, and not in issue in the cause, are not proper to be considered on the hearing": *Hunter v. Hunter*, 10 W. Va. 321. There must not only be jurisdiction as to the person affected by the decree by having him before the court by process or appearance, but there must be jurisdiction of the matter acted upon by having it also before the court in the pleadings. Multitudinous cases attest this elementary axiom of jurisdiction. If either is wanting, the decree or judgment is void, not merely voidable or erroneous: *Hogg's Equity Procedure*, sec. 573; *Haymond v. Camden*, 22 W. Va. 180 (point 5); *McCoy v. Allen*, 16 W. Va. 724; *Shaffer v. Fetter*, 30 W. Va. 248, 4 S. E. 278; *Bland v. Stewart*, 35 W. Va. 518, 5 Am. St. Rep. 262, 14 S. E. 215. Akin to this case is *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36, where a widow sued to assign dower, making the heirs parties, and the court decreed a sale, and the decree was held void because in selling the court exceeded its jurisdiction. So in *Hull v. Hull*, 26 W. Va. 1, and *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014, suits brought by widows for dower, sales decreed were held absolutely void. Why? Because in such suit, upon such a cause of suit, a sale was improper, ⁶¹⁴ the court not having proper jurisdiction for that purpose. So in this case, a suit purely for partition, there could be no sale except for the reason that the land was indivisible, certainly not for costs. In the cases just given there was more reason to justify decrees than in this case, because the bills asked a sale, and this bill did not, and stated no ground for sale. You cannot in a suit for one purpose decree for another. *Billingsley v. Minear*, 44 W. Va. 651, 30 S. E. 61, is like this case, in that the bill was good for part, but not all of the decree. It was held bad as to the part not covered by the facts stated in the bill.

It is argued that the prayer for general relief makes the decree good over the defect just stated. This cannot be so. Under a prayer for general relief you can get relief not specifically asked, provided the facts alleged in the bill and the nature of the case warrant it, not otherwise: *Hogg's Equity Procedure*, sec. 105; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553.

It is further argued that as the court had unquestionable jurisdiction to decree partition, the sale decree was warranted

by the rule that having jurisdiction for one purpose it must go on and give full relief, on principles stated in *Sinnott v. Cralle*, 4 W. Va. 600. That is where the nature of the case and the facts given in the bill justify it. A court cannot do everything in a case. This case was only one for partition; sale was not its object or nature; the bill contained nothing to call for it. That was not in the issue. "It is impossible to concede that because A and B are parties to a suit that a court may decide any matter in which they may be interested, whether such matter be involved in the litigation or not": *Black on Judgments*, 241. So the decree for sale was ultra the case.

Another reason why the sale is void is the indefiniteness of the land sold. It seems simply a sale of ninety-nine acres out of eight hundred and seventy-eight. No boundary; no description—all vague and general. Ejectment could not be maintained for it, for it was agreed in the present suit that it had never been surveyed and that its boundaries had never been ascertained, and that if the case should go for defendants, the court should direct a survey and its metes and bounds be fixed and entered of record. Thus the surveyor, not the court, would be the vendor in effect: *Blakely v. Morris*, 89 Va. 717, 17 S. E. 126.

Another reason occurs to me to show this decree void. The suit ~~was~~ sought partition only. When the decree making final partition and adjudicating costs was entered, it disposed of everything involved in the case; it was a final decree and ended the case, because it had fully performed its office of giving full relief according to the facts, and the court had nothing further to do. A final decree puts the case out of court: *Cock v. Gilpin*, 1 Rob. (Va.) 22; *Vanmeter v. Vanmeter*, 3 Gratt. 142; *Hogg's Equity Procedure*, sec. 568; *Morgan v. Ohio River R. R. Co.*, 39 W. Va. 17, 19 S. E. 588. *Childers v. Loudin*, 51 W. Va. 539; 42 S. E. 637, holds that after the term the powers of the court are closed. The decree alone put the case out of the court; but the decree expressly struck it from the docket. There was no case in court for a further decree, and the decree of sale was a nullity: *McKinney v. Kirk*, 9 W. Va. 26; *Crim v. Davison*, 6 W. Va. 465. It is no answer to this to say that Code, chapter 127, section 11, allows reinstatement. That does not apply to suits closed by final decree, but only to nonsuits and dismissal before decree.

Another reason for holding the decree of sale void comes from the question, Where did the court find its jurisdiction to sell the

fee simple of a married woman's land for her debt? At the date of the decree equity could subject the issues and profits during the coverture. This was the extent of its powers, until Acts of 1893, Code of 1899, chapter 66, section 15. Under no state of facts could it go further to pay her debts, if the land was her separate estate without a lien: *Radford v. Garwile*, 13 W. Va. 572; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917. Was the land Hester Waldron's separate estate? We do not know. She inherited it in 1861. We do not know when she was married. If before April 1st, 1869, it was not separate estate; if after that date, it would be under chapter 66, section 2 of the Code. If the land was not separate estate, I do not see how it could be at all subjected. As a contract to pay costs, her promise would be not enforceable. But say there is the decree against a married woman. It would be void, as would a judgment at law. The suit was not one to sell her land. But as the costs were in partition they might be charged expressly on the land; but this was not done. Let us say, however, that the decree is personal, and being in partition, is valid. Still, could you sell the corpus of her land? Whether we view the land as maiden land, not separate estate, or separate estate, I do not see how the land could be sold in fee. Under ⁶¹⁶ *Thorn v. Sprouse*, 39 W. Va. 706, 20 S. E. 676, it seems her land would not be liable for costs.

Counsel for the defense say that the court had jurisdiction for partition, and that even if it erred in a decree of sale, it is merely error, and is *res judicata*, and forever binding, and could be attacked only by appeal, not collaterally, as is done in this case. But this is answered by the fact that the decree is void, not voidable. A void decree may be reversed on appeal or bill of review or attacked collaterally: *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468, 2 Cyc. 590.

It is argued that as the trustee and creditor were not parties, the decree is also for that reason void. It would be as to them; but as to other parties, it would be only erroneous, not void. It was only a partition suit, to which they were not necessary parties, unless a sale was asked: 1 *Daniell's Chancery Practice*, 257; 2 *Minor's Institutes*, 418.

It is claimed that the plaintiff is estopped to say the decree of sale is void, on the theory that the decree was at her instance. To bar one of his right, the case must be plain. The record does not show that Hester Waldron moved the decree. It is likely that Buskirk did. An order does show that she moved

the reinstatement, which, though it so states, is not likely, and probably an unauthorized statement, as Buskirk gave the plaintiff notice that he would ask reinstatement. But pass this. The decree of sale, another order than that of reinstatement, was not moved by her. Is it likely she would move a decree against herself? She got the benefit of the decree in having its proceeds pay her debt, but did not ask its benefit. Though the record does not disclose that she did anything working an estoppel, yet as it is argued that she did, I will say that if she did, yet as she was a married woman, whether this land is or is not separate estate, she could not lose her title by estoppel in pais, for reasons given in *Williamson v. Jones*, 43 W. Va. 562 (point 11), 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694. In that late excellent chancery work, *American and English Decisions in Equity*, volume 4, page 363, in a full note on Estoppel by Conduct, I find this: "She cannot be estopped with reference to her legal title to real estate, however, since that can only be conveyed according to the statutory requirements." Very many cases are cited from all quarters to support the proposition: *Heavner v. Godfrey*, 3 W. Va. 426; ⁶¹⁷ *McNeely v. South Penn Oil Co.*, 52 W. Va. 643, 44 S. E. 508, 62 L. R. A. 562. The answer says Hester Waldron admitted in conversation that Nighbert owned the land. Title to land cannot pass by admission when statute requires a deed: Cases given in *McNeely v. South Penn Oil Co.*, 52 W. Va. 644, 44 S. E. 508, 62 L. R. A. 562; *High v. Pancake*, 42 W. Va. 607, 26 S. E. 536. But the replication denies this allegation. It was mere mistaken opinion, not misleading anyone to outlay.

Laches: This defense cannot avail. View Hester Waldron's estate as not separate, and the rule applies that laches cannot be imputed to a married woman: *Baker v. Morris*, 10 Leigh, 284; 18 Am. & Eng. Ency. of Law, 2d ed., 107; *Hogg's Equity Principles*, 418. Waldrons being in possession, laches is not imputable to them, as the defendants were not in possession: *State v. Sponagle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. In addition, this case is one of legal title, and is governed by the statute of limitations—that is, the right to the land—and as that statute does not bar the plaintiff, as will be presently sought to be shown, laches cannot bar, as clearly a right yet good under the statute is not lost by laches. Laches applies to equitable demands where the statute of limitations does not. "Mere delay in asserting a right, short of the limitation fixed by statute, does not bar the right in equity": 8 Am. & Eng.

Dec. in Eq. 677. If a legal right gets into equity, the statute governs: Hogg's Equity Principles, 415; Wilson v. Harper, 25 W. Va. 179. The cases of Pusey v. Gardner, 21 W. Va. 470, and Trader v. Jarvis, 23 W. Va. 101, do not apply, because they were about equitable rights.

View Hester Waldron's land as separate estate, and say that laches is imputable to a woman as to her separate estate. If the statute does not bar, laches do not bar, as just stated.

Statute of limitations: If the land was maiden land, not separate estate, and there had been actual possession by the purchaser, Nighbert, of the ninety-nine acres, the statute would bar the joint right during coverture: Merritt v. Hughes, 36 W. Va. 366, 15 S. E. 56; Caperton v. Gregory, 11 Gratt. 505. But the wife's estate would be saved by coverture. But the joint right of Hester Waldron and husband cannot be so barred for want of actual possession of the ninety-nine acres by those claiming under the sale. Before that sale Hester Waldron and husband had actual possession of the tract assigned her, and that possession, though not on the ninety-nine acres, included it, as possession of part ⁶¹⁸ is of the whole. If Nighbert's purchase were not void, it may be that his possession of the John B. Clark land would be extended over the ninety-nine acre coterminous tract on the same principle, as it would in such case be the better right and would displace the constructive, actual possession of the Waldrons; but the sale, being void, did not displace the constructive, actual possession of the Waldrons of the ninety-nine acres, because it did not for a moment extend to it: Overton v. Davisson, 1 Gratt. 211, 42 Am. Dec. 544. So Nighbert and those under him never had actual, or constructively actual, possession of this ninety-nine acres. Thus, the joint estate is not barred. So if we view it as separate estate, the wife's right is not barred, for like reason—want of possession.

The defendants ask, Are not our purchase and deed under it color of title? The plaintiffs say that it is not, because it has been held that one who buys at a court sale that is void holds no adverse possession against the former owner. For this broad position that a deed under a void sale is no color of title, Hall v. Hall, 27 W. Va. 468, Lynch v. Andrews, 25 W. Va. 751, and Sturm v. Fleming, 26 W. Va. 54, are cited.

I think the last case only holds that payment of taxes by the purchaser keeps the land from being forfeited for nonentry by the former owner. The first two cases at first seemed to con-

dict with *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527, and with *Swann v. Thayer*, 36 W. Va. 47, 14 S. E. 423, holding void sales good for color of title and adverse possession, which they certainly are on sound principle: *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562. But on examination we see that in the cases of *Hall v. Hall*, 27 W. Va. 468, and *Lynch v. Andrews*, 25 W. Va. 751, the litigation in which the sales were made continued, and the sales were set aside in those same cases. The purchasers were like *pendente lite* purchasers, who cannot plead the statute. Those cases do not apply in this case for reasons just stated. It is clear that, except under special circumstances, possession under a sale is adverse, though the sale be void. "The possession of a purchaser at a judicial sale is adverse to the judgment debtor": 1 Cyc. 1054; 1 Am. & Eng. Ency. of Law, 2d ed., 850. On page 845 we read: "A deed which is executed pursuant to a decree of a court of competent jurisdiction gives color of title, even though the decree is void."
⁶¹⁹ Possession under a deed from a vendor is adverse to him; possession under a void tax deed is adverse to the former owner. By a parody of reason a deed under a void decree purporting to pass the owner's title is color of title: *Simpson v. Edmington*, 23 W. Va. 675; *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832. A void deed was so held in *Cooey v. Porter*, 22 W. Va. 121. Whilst I assert that a deed under a void decree would give good title by adverse possession, yet for want of actual possession in this case it avails nothing. Besides, the decree was void for want of description of the land, and thus not good for color of title. And if the land was maiden land, not separate estate, no possession would avail against *Hester Waldron* or her heirs until after the death of her husband: *McNeely v. South Penn Oil Co.*, 52 W. Va. 617, 44 S. E. 508, 62 L. R. A. 562; *Caperton v. Gregory*, 11 Gratt. 505. She has been under disability every moment since the sale, and her right is protected by section 3, chapter 104 of the Code, giving one or those claiming under him five years for suit after the end of disability.

I do not understand that it is contended in the brief that payment of taxes by *Nighbert* and his alienees and the failure of *Waldrons* to pay tax vest title in *Nighbert* by reason of forfeiture of *Waldron's* right for nonentry for taxes under section 8, article 13, of the constitution. If such is the meaning of the allegation of such payment by *Nighbert* and nonentry by *Wal-*

drons it is not tenable. There has been no actual possession under the first and last clauses to apply them, and no claim under a grant from the state to apply the second clause. And, further, *Sturm v. Fleming*, 26 W. Va. 54, and *Lynch v. Andrews*, 25 W. Va. 751, and *Hall v. Hall*, 27 W. Va. 468, hold that taxes paid by a purchaser under a void decree inure to the former owner's benefit to prevent forfeiture by his nonentry for taxes. This is on the theory of identity of title and privity of estate.

Equity jurisdiction: I have shown above that the Waldrons have always been in actual possession. That gives them right to sue in equity to remove cloud: *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353; *Hogg's Equity Principles*, 81. Likely, we may say they have jurisdiction to vacate a void decree.

As the money of Nighbert and those under his title paid just claims against Waldron and wife to pay costs of partition and taxes, the plaintiff must do equity by refunding the same ⁶³⁰ with six per cent per annum interest from proper dates, which shall be ascertained and declared a lien on the ninety-nine acres.

I believe it is not claimed that though the sale and deed are void the purchasers under Nighbert can be protected. They cannot be for these reasons: 1. Their answer does not show that they are complete purchasers by payment of purchase money before notice of defect of title: *Hogg's Equity Procedure*, sec. 433. 2. They are not complete purchasers, because the legal title was outstanding in trustee Stratton, who was not a party to the suit in which Waldron's land was sold. 3. A purchaser from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. He is bound to know defects in papers showing his claim of title: *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014; 23 Am. & Eng. Ency. of Law, 2d ed., 508; *Wood v. Krebs*, 30 Gratt. 708; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694. Code, chapter 132, section 8, does not protect a sale under a totally void decree. Title falls with its vacation. The title was never for a moment good; never existed.

Therefore, it is adjudged, ordered and decreed that the decree of the circuit court of Mingo county, entered on the twenty-first day of February, 1901, be reversed; that the decrees entered in the case of *M. H. Waldron and Wife v. Luemma Clark and Others*, by the circuit court of Logan county, on the

fourteenth day of October, 1886, and sixteenth day of April, 1887, be vacated and annulled, and that the deed made under said decrees by H. C. Ragland, commissioner, to J. A. Nighbert, on record in the office of the clerk of the county court of Logan county, in deed-book "J," page 341, be vacated and set aside so far as the plaintiffs are concerned therein, and that the title or right of Thomas H. Harvey, S. S. Altizer, Nicie Nighbert and G. F. Miller in the tract of ninety-nine acres of land specified in said commissioner's deed be vacated and held for naught as to the plaintiffs. The cause is remanded to the circuit court of Mingo county to ascertain the proper sum payable by Waldron and wife for costs and taxes as according to this opinion.

Partition may, in a proper case, be by sale: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929; *Pearce v. Rickard*, 18 R. I. 142, 49 Am. St. Rep. 755; *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738. The effect of compulsory partition is the subject of a recent note to *Carter v. White*, 101 Am. St. Rep. 864-877.

Estoppel Against Married Women is the subject of a monographic note to *Trimble v. State*, 57 Am. St. Rep. 169-185. See, too, *Stacey v. Walter*, 125 Ala. 291, 82 Am. St. Rep. 235; *Cauble v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871.

The Doctrine of Laches does not apply to a case in which the plaintiff does not ask equitable relief, but seeks in a court of law to enforce a plain legal title in an action not barred by the statute of limitations: *McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84. But see *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 699. As to whether married women are subject to the imputation of laches, see *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1040; note to *Bell v. Hudson*, 2 Am. St. Rep. 806.

Color of Title may be given by void judicial proceedings: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 723, on what constitutes color of title.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KELLEY, MAUS & CO. v. LA CROSSE CARRIAGE COMPANY.

[120 Wis. 84, 97 N. W. 674.]

DAMAGES, Measure of—General Rule.—He who breaks a contract is liable to compensate the other party for all damages occasioned by the breach which might reasonably be expected to flow therefrom under ordinary circumstances or peculiar circumstances of which the contractor is informed at the breach of the contract. (p. 975.)

DAMAGES must be Limited to those which the reasonable diligence of the other contracting party could not avert. (p. 975.)

DAMAGES, Measure of.—In Case of the Failure to Deliver a Commodity Purchased in the Open Market the general damages are limited to the difference between the market price and the contract price, because by reasonable diligence the articles contracted for may be obtained at their market price. (p. 975.)

SPECIAL DAMAGES must not be so Uncertain or Conjectural that they cannot with practical safety be ascertained. (pp. 975, 976.)

DAMAGES—Loss of Prospective Profits.—If the contemplated result of the breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Only when the estimate of prospective profits involves such a degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should the courts reject it, if loss of profits is the result of the breach of the contract. (p. 976.)

DAMAGES, Failure to Lessen, When Excusable.—If, after entering into a contract for the purchase of springs to be used in the construction of vehicles, the purchaser omits to make efforts to purchase them elsewhere, his omission is excusable and does not diminish his right to recover damages, if he relied on the seller's assurance that he would be able to furnish them before they could be obtained elsewhere, and they were not purchasable in the open market and were of designs specially adapted to the purchaser's business and obtainable only by special order from some manufacturer. (pp. 976, 977.)

DAMAGES—Loss of Profits of Business.—Under a contract to manufacture and deliver springs to be used on vehicles to be constructed in the purchaser's factory, if the seller is guilty of a breach of contract, the purchaser is entitled to recover as damages the difference between the cost of manufacture and the selling price of such number of vehicles as the seller would have, with reasonable certainty, produced and have been able to sell during the current season, if the seller had knowledge of such a state of facts with reference to the purchaser's business or the business of manufacturing vehicles generally that the seller should have, as a reasonable man, contemplated that such injury might probably result from the failure to supply the springs at the time required by the contract. (p. 977.)

DAMAGES—Loss of Use of Factory.—If a seller of materials known to be necessary for the use of a factory fails to deliver them at the time stipulated in the contract, he is liable in damages for the breach of the contract for the value of the use of the factory so far as such use was prevented by such breach. (p. 977.)

DAMAGES for Loss of, or Interruption to, Business.—Where a business has been long established, past experience may establish, with sufficient certainty, what would have been the course and result of that business during a certain period of interruption, and hence damages may be allowed for such interruption resulting from a breach of contract to sell materials without which the business could not be carried on and the absence of which led to the interruption. (p. 978.)

DAMAGES—Losses and Expenses Due to an Effort to Avert Damages.—Where there has been a breach of a contract to sell materials necessary to the operation of a factory, there may be allowed as damages, in addition to the lost use of the factory, the expenses of any efforts made by the purchaser consistent with due and reasonable diligence to avert general damages and in the way of efforts to expedite the delivery of the articles under the contract and to find and purchase other materials to supply the place of those which the seller did not deliver in time, together with the necessary cost of any other materials so purchased. (p. 978.)

DAMAGES, Effect of Defendant's Knowledge that Damages would Probably Result from His Breach of a Contract.—One who sells a manufacturer parts of vehicles within a fixed time for delivery must contemplate that their nondelivery at the time stipulated would inconvenience and disarrange the system of manufacturing, especially if he is familiar with the conduct of such factories generally. Hence, in an action to recover damages for nondelivery, evidence may be received to prove the knowledge of the seller and his agents as to the operation of such manufacturing plants or of special information as to the purchaser's situation and as to his sales, either made or prospective, although the information did not extend to all the details, such as the persons to whom and the prices at which sales had been, or were expected to be, made. (p. 979.)

DAMAGES, Evidence Admissible to Prove.—In an action for a breach of a contract to sell and deliver materials evidence should be received to prove even general knowledge on the part of the seller as to how the purchaser's business was carried on either in manufacturing, selling or obtaining necessary supplies of material, whether such knowledge was derivable from the seller's general familiarity with the business or from facts communicated to him at or prior to the making of the contract. (p. 980.)

DAMAGES.—Evidence of the Custom of Operating a Factory should be received in an action for a breach of contract by which such operation was, for a time, necessarily suspended, if such evidence tends to prove the manner in which, or the extent to which, such breach interrupted such operation or diminished its efficiency. (p. 980.)

DAMAGES, Evidence of in an Action for the Breach of a Contract.—In an action to recover damages for failure to furnish certain springs to be used as parts of vehicles, evidence of the actual effect of their absence after the time at which they were agreed to be furnished is admissible. This may involve the extent to which men were kept in idleness in the purchaser's factory and the efficiency of their labor impaired and the nonutility or lessened utility of any springs received from the seller after the contract period, and especially after the close of the season; also of the capacity of the shop during the period of complete or partial interruption of business after the springs were due, confined, however, to that which was ordinary and usual. But evidence should not be received of the money value of the time of the men lost by reason of want of such springs. (p. 980.)

DAMAGES—Evidence Admissible to Prove.—In an action to recover damages for the failure to furnish a manufacturer springs to be used as parts of vehicles, evidence is admissible to show that he had a sufficient supply of materials and parts of vehicles other than springs and all labor to keep his factory running to an extent not exceeding that which was usual and customary, and that sales had been made in excess of what the factory was able to produce with the shortage of springs due to such breach, provided such sales did not exceed such as should have been within the reasonable contemplation of the parties, but evidence should not be received of the profits of specific vehicles included in such orders. (p. 980.)

DAMAGES—Evidence that a Party Suffering from the Breach of a Contract could not have Lessened His Damages by Reasonable Diligence.—In an action to recover damages for the breach of a contract to supply certain materials, evidence is admissible to prove that the purchaser could not, by reasonable diligence, supply himself with such materials merely by paying an enhanced price. (pp. 980, 981.)

DAMAGES—Evidence of Diligence on the Part of the Person Suffering from the Breach of a Contract.—In an action to recover damages for the breach of a contract to deliver springs to be used by a manufacturer of vehicles, evidence is admissible to show diligence exercised by him after he had reasonable ground to believe that the seller would default in seasonable delivery, in the way of attempts to obtain such springs elsewhere or to expedite shipments from the seller's place of manufacture, and also to show the representations and promises on the part of the latter which might have induced him to forego efforts which he would otherwise have made. (p. 981.)

DAMAGES for the Breach of a Contract—Expenses.—One who is guilty of the breach of a contract to supply certain materials is liable in damages for the expenses incurred by the other party in a reasonably diligent effort to obtain such materials elsewhere. (p. 981.)

EVIDENCE.—Letters Written by a Party are not Admissible in His Favor to prove any of the facts stated in them. (p. 981.)

EVIDENCE of Lost Letters.—If a party receiving a letter proves that he has made diligent search for and cannot find it, he

should be permitted to offer secondary evidence of its contents. Notice to the writer to produce such letter is not essential, because there is no reason to believe it is in his custody. (p. 981.)

DAMAGES.—Evidence of Willfulness on the Part of a Person Guilty of the Breach of a Contract is not admissible in an action to recover damages therefor. Motive can neither create nor increase his liability in an action founded on such breach. (p. 982.)

EVIDENCE Restricted to the Pleadings.—In an action to recover damages for the breach of a contract, evidence is not admissible of any new agreement entered into between the parties of which no allegation is made in the pleadings. (p. 982.)

Action to recover for vehicle springs delivered by the plaintiff to the defendant under a contract dated September 17, 1900. The delivery of the springs was not denied, but the defendant interposed counterclaims, first, for the payment of freight, second, for the failure to deliver fifty-two sets of springs, and third, for the failure to deliver springs at the time stipulated for in the contract or within a reasonable time thereafter, whereby the business of the defendant's factory was greatly interrupted. Evidence was offered by the defendant to prove that it was an established manufactory of vehicles having a factory with an output of approximately six thousand vehicles per year; that the plaintiff had for many years been in the business of selling materials and parts of vehicles to such factory; that in conducting the business it was necessary to contract for supplies to meet the prospective requirements of the year's business; that the turning of the year occurred about the 1st of July; that the custom was to sell vehicles by soliciting orders from the dealers throughout the country; that having a contract for springs for six thousand vehicles with a manufacturer known as the Lewis Company, that company was precluded from furnishing such springs by reason of the destruction of its factory; that thereupon defendant applied to the plaintiff for a supply of springs for the rest of the season's business, and a contract was entered into for the number specified. The defendant also offered to prove the familiarity of the plaintiff with the method in which the business was done, and that it was informed when such contract was entered into of the character of the defendant's business and of the fact that it had orders for a considerable number of vehicles. It was conceded that a reasonable time for the delivery of the springs was not later than March 1, 1901, and that but a small quantity of them was delivered until the months of July, August, September and November of the same year. The defendant sought to prove the method of

manufacture; that it had men and all other materials except springs to supply all its orders; that it was delayed and prevented from filling many orders by reason of the delay in obtaining springs, and that its profits from such orders were five dollars per vehicle; also that it made expenditures for travel incurred in efforts to obtain springs both from the plaintiff and others, after plaintiff was in default, for the purpose of diminishing defendant's loss, and the number of vehicles its factory would have produced but for want of the springs. The trial court excluded all evidence thus offered, and ruled that no loss could be recovered upon orders not specifically communicated to the plaintiff at the time of the making of the contract. At the trial, the amount of the plaintiff's bill was agreed upon and the amount recoverable upon the first and second counterclaim, and the jury were directed to find a verdict in favor of the plaintiff for its bill, less the first and second counterclaims, and allowing nothing upon the third counterclaim. Verdict and judgment accordingly, and the defendant appealed.

A. E. Bleekman, for the appellant.

Benjamin F. Bryant, for the respondent.

80 DODGE, J. The rule of law is general that he who breaks a contract is liable to compensate the other party for all damages occasioned by the breach, which might reasonably be expected to flow therefrom, under either ordinary circumstances, or peculiar circumstances of which the contractor is 90 informed at the time of contracting. Such damages are deemed to have been contemplated by the parties: *Hadley v. Baxendale*, 9 Ex. 341; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Guetzkow B. Co. v. A. H. Andrews & Co.*, 92 Wis. 214, 53 Am. St. Rep. 909, 66 N. W. 119, 52 L. R. A. 209. Such liability is, of course, limited to damages which reasonable diligence of the other contracting party could not avert; hence results that, in case of failure to deliver a commodity purchasable in the open market, the general damages are limited to the difference between the market price and the contract price, for reasonable diligence will in such case obtain the contracted article at the market price. Another limitation upon special damages is that they must not be so uncertain and conjectural that they cannot, with practical safety,

be ascertained: *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. Rep. 393, 46 N. W. 1045, 9 L. R. A. 807; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896. It is under this last limitation that prospective profits have in many cases been held not a proper measure of damages. If, however, the contemplated result of breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Otherwise complete justice is not done, and the contract, which in ultimate analysis is the foundation of commerce, is robbed wholly or partially of its sanction. Only when the estimate of prospective profits involves such degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should courts reject it if loss of profits is the result of the breach of the contract: *Richardson v. Chynoweth*, 26 Wis. 656; *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 35; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Shadbolt & B. I. Co. v. Topliff*, 85 Wis. 513, 55 N. W. 856; *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785.

Attempting to apply these principles to the damages in the present case, some rules for ascertaining the damages recoverable⁹¹ become obvious: First, if the defendant, upon ascertaining the breach of this contract, with ordinary diligence—that is, the diligence which the ordinarily prudent and diligent man, or the great mass of mankind, under like circumstances, would have exercised—could have promptly obtained springs such as those specified in the contract in the open market, he can recover, as general damages, only the difference between the price at which he could so have obtained them and the contract price, together with such special damages as he must nevertheless have suffered, such as necessary expenses in finding and procuring such other springs, or in his efforts, consistent with reasonable prudence and diligence, to expedite delivery of contract springs. Of course, defendant's acts in omitting to make purchases of springs which had to be manufactured before they could be furnished must be viewed in the light of all the circumstances, including the frequent assurances from plaintiff that it would ship soon, and probably earlier than the springs could be made elsewhere. Plaintiff cannot complain because defendant relied on such assurances and pretermitted efforts to buy elsewhere,

if such would have been the conduct of ordinarily prudent persons under those circumstances. If, on the other hand, the evidence shall disclose that springs such as defendant contracted for were not purchasable in the open market, or were of designs specially adapted for defendant's vehicles and obtainable only by special order to some manufacturer, so that they were not obtainable by such diligence as above defined, and that, by plaintiff's failure to deliver at the time agreed, defendant was prevented from producing from its factory the number of vehicles which, but for the plaintiff's delay in delivering, that factory would, with reasonable certainty, have produced, and that defendant, with reasonable certainty, would have been able to sell all of such output during the then current season, in such case it is clear the defendant would have lost the difference between the cost of manufacture ^{vs} and the net selling price of the vehicles it was so prevented from manufacturing and selling. Such sum, then, it would be entitled to recover from plaintiff, if the latter had knowledge of such facts with reference to defendant's business, or to the vehicle manufacturing business generally, that its officers or agents, as reasonable men, should have contemplated that such injury might probably result from failure to supply springs at the time required by the contract. This is in effect allowing defendant the value of the use of its factory so far as that use was prevented by the breach of the contract, a method of measuring damages approved in *Hinckley v. Beckwith*, 13 Wis. 31. This method of measuring the damage is greatly more certain and comprehensive than that contended for by defendant, consisting of numerous elements. Thus the attempt to prove that defendant had orders for certain vehicles of which a part were canceled because of its delays in filling them, and to predicate thereon damages to the amount of the profits included in the price of the countermanded vehicles, involves the fallacious assumption that the profit on any such vehicles left on hand has been lost. Any such vehicles may afterward have been, or may yet be, sold to others at the same or greater price. Again, the attempt, uncertain at best, to estimate the extent to which men in the several departments of the factory were kept in idleness by failure of seasonable delivery of springs, in order that their lost time might be recovered as a specific element of damage, is rendered wholly unnecessary, for that element will be in-

cluded in the lost use of the factory and plant. Further, it is notable that allowance of both the last-mentioned elements of damage would involve some measure of duplication. Still further, it appeared that defendant diminished its force somewhat, both in its factory and in its selling department. Now, if profits on countermanded orders were adopted, we see no reason why savings resulting from reduction of expenses must not be ascertained and deducted. That necessity disappears ^{as} if we ascertain the value of the lost use of the whole establishment as measured by comparison of its output according to its capacity under usual circumstances and its output as impaired by plaintiff's default. That, in the case of a long-established business, past experience may establish with sufficient certainty what would have been the course and results of that business during a certain period of interruption, has support from *Hinckley v. Beckwith*, 13 Wis. 31; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Shadboit & B. I. Co. v. Topliff*, 85 Wis. 513, 55 N. W. 854; *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785. It is also held that the events which do in fact occur may serve to render sufficiently certain the damages, if they are not so extraordinary or beyond expectation that they would not have been reasonably within the contemplation of the contracting parties: *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Guetzkow B. Co. v. A. H. Andrews & Co.*, 92 Wis. 214, 53 Am. St. Rep. 909, 66 N. W. 119, 52 L. R. A. 209; *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300.

In addition to the element of damage already discussed, denominated "lost use of factory," the defendant is also entitled to recover the expenses of any efforts made by it, consistent with due and reasonable diligence, to avert such general damages, in the way of certain journeys of officers and employés to Racine and to Chicago to expedite the shipment of springs under this contract, after plaintiff's default became apparent; also in the way of some other trips to find and purchase springs from others to supply the place of those plaintiff had failed to deliver on time, together with the necessary increased cost of any springs so purchased. This class of damage results from the duty of the defendant already mentioned to exercise due diligence to minimize its damages after learning that plaintiff would default. The expense of such efforts is directly attributable to the breach of the contract, and,

being but the legal duty of defendant, was, of course, within the contemplation of the parties at the time of contracting.

As we have already intimated, the liability of the plaintiff for any damages depends on whether it ought reasonably to have contemplated that damages of the general character might probably result from a failure to deliver springs at the time agreed. This does not require that it must have exact knowledge or information in detail. One who sells to a merchant necessarily contemplates that he will resell in the ordinary way, and at profits not unreasonably variant from the customary ones. One who sells to a manufacturer parts of vehicles, with a fixed time of delivery, must of necessity contemplate that their nondelivery at the time specified will inconvenience and disarrange the system of manufacturing. Especially is this true if he is familiar with the conduct of such factories generally. Hence it was entirely proper for defendant to have proved knowledge of the plaintiff's officers or agents as to the operation of such manufacturing plants, resulting either from its years of contract with such business, or from specific information given as to defendant's own situation or as to its sales, either made or expected, and the like, although the information did not extend to all the details, such as the persons to whom, or the prices at which, sales had been or were expected to be made. Factories are ordinarily operated at a profit, therefore a reasonable man may be assumed to contemplate that an interruption of the operation will cause loss to its owners. He need not know in detail just what loss, provided it be reasonable and within usual experience: *Guetzkow B. Co. v. A. H. Andrews & Co.*, 92 Wis. 214, 53 Am. St. Rep. 909, 66 N. W. 119, 52 L. R. A. 209.

We have now indicated, at least generally, the elements which, in the light of the counterclaim and the evidence offered, may go to make up the damages recoverable under the third counterclaim, if the jury shall find the facts to warrant them. In so doing, we have by implication shown that very many of the exclusions of evidence assigned as error were erroneous, and we may dispense with discussion of most of such assignments, which are very numerous. Such rulings on evidence resulted from primary errors as to the rule of damages and of the extent to which plaintiff must have had knowledge, in all the details, of the effects which its delay in delivery of springs would have on defendant. We may, how-

ever, briefly mention some of the classes of evidence which the court excluded.

As already said, the court should have admitted any evidence tending to prove even general knowledge on the part of the plaintiff of how the wagon business was carried on, either in manufacturing, selling or obtaining the necessary supplies of material; whether such knowledge was derivable from its general familiarity with the wagon business, or from facts communicated to it at or prior to the time of the making of the contract.

Evidence of the custom of operating the factory, tending to show the manner in which, and extent to which, nonsupply of springs interrupted its operation and diminished its efficacy, was admissible. Also evidence of the actual effect of absence of springs after the time at which the respondent was bound by contract to make delivery. This may involve the extent to which men were kept in idleness or the efficiency of their labor impaired, and the nonutility or lessened utility of any springs received from the plaintiff after the contract period, and especially after the alleged close of the season. Also proof of the capacity of the shop during the period of complete or partial interruption after the springs were due, confined, however, to that which was ordinary and usual.

We are unable to discover the relevancy, however, of the money value of the time of men lost by reason of want of springs, as it is not a proper specific element of recovery.

Another class of evidence which was clearly admissible was that tending to show that defendant had sufficient supply of materials and parts of wagons—other than springs—and of labor to keep its factory running to an extent not exceeding that which was usual and customary. Also evidence to prove the fact of sales in excess of what the factory was able to produce with the shortage of springs. To this end the orders received, either before or after the contract, were relevant, provided they did not exceed such as should have been within the reasonable contemplation of the parties.

We, however, do not deem admissible proof of the profits on the specific vehicles included in these orders, for reasons already stated.

Another class of evidence which, generally, should have been admitted, was that bearing upon whether a market existed from which the defendant, with reasonable diligence, could have supplied itself promptly enough to have avoided

other damage by merely paying some enhanced price for springs. In this is involved testimony which was offered that springs in quantity sufficient for factories such as this were ordinarily obtained and obtainable only by contract long enough in advance to enable their manufacture; also description of the springs contracted for, to the extent at least of showing whether they were peculiar in any of their details, so as to be especially adapted to the types of vehicles manufactured by defendant.

Evidence was also admissible to show the diligence exercised by the defendant, after it had reasonable ground to believe that plaintiff would default in seasonable delivery, in the way of attempting to obtain springs elsewhere or to expedite the shipments from plaintiff's place of manufacture, and therein to show representations and promises on the part of the plaintiff which might have induced it to forego efforts which it might otherwise have made; as, for example, in the release or partial release of its former contract with the Lewis Company of Michigan.

⁹⁷ Defendant should also be permitted to prove expenses incurred in such reasonably diligent efforts to obtain springs after it ascertained that the plaintiff could not furnish them within the time limit of the contract.

Various letters between the defendant and the Higgins Spring Company, at whose factory plaintiff was having the contract springs manufactured, were offered in evidence. Possibly the fact of the writing of some of these letters might have been admissible as bearing upon the defendant's diligence, but of course they are *res inter alios acta*, and could not be received as evidence of any facts stated in them.

Evidence having been given of the receipt of a letter from the plaintiff, referred to in a letter received in evidence, and that diligent search had been made for that letter, but that it could not be found, offer was made to prove its contents by the testimony of a witness who had seen it. This was excluded, on what theory we do not understand. If the letter itself was material and its loss was established, the foundation for secondary evidence of its contents would seem to have existed. Notice to the plaintiff to produce it was not essential, for there was no reason to suppose that it was in plaintiff's custody, having been written to and received by the defendant.

The court rightly excluded evidence offered to show willfulness of the plaintiff in its breach of the contract. Such fact was wholly irrelevant. Motive could neither create nor increase its liability in this action, founded upon breach of contract.

A special contention is made that, although plaintiff might not have had knowledge of such facts as to make it contemplate all the results of its breach at the time of the making of the contract in December, still on February 23d following it entered into a new agreement, upon consideration that defendant should refrain from supplying itself with springs elsewhere, that it would deliver all the springs mentioned in ^{us} the former contract within thirty days from that date, and that at that time it received certain additional and specific information of the predicament in which failure of delivery would plunge the defendant. Doubtless, if a new and valid agreement was made at that time, it would be material to establish the knowledge which the plaintiff had as affecting its liability for a breach of that agreement, provided any counterclaim had been pleaded for such damages. We find no such counterclaim, however. There is no allegation of a contract later than and different from that confessedly made on December 17th, hence the fact of the communications to plaintiff on February 23d was not relevant, and was rightly excluded.

From the foregoing it is of course obvious that the court also erred in directing a verdict in favor of the plaintiff, denying the defendant all recovery upon its third counterclaim. Evidence had been introduced or offered to establish the breach of the contract, to establish, at least, various efforts on the part of the defendant to minimize the damages resulting from that breach, in the way of seeking to obtain springs both from the plaintiff and from others, and that it had succeeded to some extent. Evidence had also been admitted of certain expenses in so doing, although that as to other expenses had been excluded. There was also evidence certainly tending to establish general damages in the line of impairment of the output of the factory, as above discussed, and the long experience of plaintiff in dealing with factories of this general character, so that, even from the evidence actually admitted, the jury might have found facts to warrant some recovery.

By the Court. Judgment reversed, and cause remanded for a new trial.

If Goods Sold are not Delivered, the measure of damages is usually the additional cost at which they can be obtained in open market: *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, ante, p. 378. However, all damages resulting necessarily, immediately and directly from the breach of a contract of sale are recoverable: *Lonerger v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, and cases cited in the cross-reference note thereto. Thus, one who sells pipe to a contractor to lay a ditch already dug, and who is notified that in the event of rain the ditch will cave in, may be liable for the cost of redigging the ditch, which, because of the nondelivery of the pipe, is washed in by a rain as apprehended: *Lonerger v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365. And, if goods are not delivered, the buyer may be entitled to recover profits lost through the fault of the seller, if they are not obtainable in the market: *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, ante, p. 378.

LOWE v. CONROY.

[120 Wis. 151, 97 N. W. 942.]

BOARDS OF HEALTH, Powers of to Destroy Property.—The legislature may grant to boards of health authority to employ all means required to protect the public health, and, if necessary to that end, to destroy private property. (p. 986.)

BOARDS OF HEALTH, Power of to Destroy Animals Affected With Disease.—The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it within the class of cases which can only be dealt with effectually by the destruction of the animals afflicted. (p. 986.)

BOARDS OF HEALTH, Determination of, that Disease Exists or that Property is a Nuisance.—Though a board of health may be authorized to abate a source of danger to the public health, and, if necessary, to destroy it even when it consists of private property, yet the board acts at its peril, if the property is not in fact a nuisance or source of danger, if the owner is not first given an opportunity to be heard at a trial for the purpose of showing that his property is not a nuisance nor dangerous to the public health. (p. 987.)

A BOARD OF HEALTH is Liable to an Action for Summarily Destroying Property on the ground that it is a nuisance or dangerous to the public health, if the owner can show that it was neither. (p. 987.)

A MUNICIPAL CORPORATION is not Liable for the Acts of Its Board of Health or Health Officer in Summarily Destroying Property on the ground that it is dangerous to the public health, though such danger did not in fact exist. (p. 988.)

LIABILITY OF HEALTH BOARDS and Others Exercising Quasi Judicial Powers.—Though a health officer is vested with quasi judicial authority to determine whether property is dangerous to the public health, and to destroy it if so, he is personally liable for property destroyed by him in the honest exercise of his judgment, if such property is not in fact dangerous to the public health, and its owner has no means of redress other than by action against such officer. (pp. 988, 989.)

HEALTH OFFICER—Destruction of Property by, What Establishes.—If the evidence shows that a health officer made a written order directing the destruction of certain property and gave personal directions to his deputy and others, who actually destroyed the property, and that they all proceeded under his direction, there can be no doubt that the court did not err in answering in the affirmative the question whether such officer caused the destruction of the property. (p. 990.)

Action for the destruction of certain property owned by the plaintiff, who was in the business of conducting a meat market in the city of Neillsville, of which the defendant was health officer. In August, 1901, a steer on the plaintiff's farm was found sick from some ailment. A veterinary surgeon employed by the plaintiff informed the defendant that he believed such steer and another animal showed symptoms of anthrax. The steer died on the same day. The respondent flayed him, burned the carcass, and placed the hide among others in the basement of his meat market. The state veterinarian visited the place with the defendant, and, after certain investigations, concluded that the blood of the steer contained the bacilli of anthrax. On August 3d, the defendant consulted with the mayor and other officers of the city, and later on the same day received instructions from the secretary of the state board of health to destroy any hides which had been exposed, and to disinfect the shop and premises if exposed to anthrax infection. The defendant believed the steer had died from anthrax and that plaintiff's shop and some hides and beef in his slaughter-house had been exposed to the disease. The defendant issued a written order which he directed his deputy to serve on the plaintiff, which order notified plaintiff to remove the hides from the basement of his premises, or to destroy them, and also the beef of another animal which had been butchered and prepared for market, which animal had been pointed out as having the symptoms of anthrax. The plaintiff refused to comply with this order, and afterward, on the same day, the hides and beef were burned, pursuant to such order of August 5th.

The trial court found that the defendant acted in good faith in the discharge of what he believed to be his duty; that the property destroyed was of the value of two hundred and thirty-nine dollars and seventy cents. The jury found that the steer was not in fact afflicted with any dangerous or contagious disease, and that the defendant had not any reasonable cause to believe that it was so afflicted. Judgment was entered in favor of the plaintiff, and the defendant appealed.

S. M. Marsh, for the appellant.

J. E. Wildish and L. M. Sturdevant, for the respondent.

¹⁵⁴ SIEBECKER, J. The appellant, as a health officer of the city of Neillsville, seeks to justify the destruction of respondent's property upon the authority vested in the board of health for the adoption of such measures to abate nuisances and remove sources of filth and causes of sickness as may be deemed most effectual to preserve the public health. By section 1411 of the Statutes of 1898, it is provided that every town, village and city board of health "may take such measures and make such rules and regulations as they may deem most effectual for the preservation of the public health. They may appoint as many persons to aid them in the execution of their powers and duties as they may think proper, . . . examine into all nuisances, sources of filth and causes of sickness and make such rules and regulations respecting the same as they may judge necessary for the protection of the public health and safety of the inhabitants." Section 1412 of the Statutes of 1898 prescribes as a part of the health officer's duty: "Upon appearance of any dangerous contagious disease in the territory within the jurisdiction of the board of which he is a member to immediately investigate all the circumstances attendant upon the appearance of such disease," and "at all times promptly to take such measures for the prevention, ¹⁵⁵ suppression and control of any such disease as may in his judgment be needful and proper, subject to the approval of the board of which he is a member."

By section 1414 of the Statutes of 1898, boards of health are given authority to order nuisances and causes of sickness removed from private property by the owner or occupant, and upon his refusal or neglect to comply the board may cause its removal, and recover the expense thereof.

The common council of the city of Neillsville by ordinances adopted these provisions as a part of the regulations for the preservation of the public health, and provided for the organization of the board of health, prescribing the duties of the board and its health officer in carrying out the powers and duties imposed by law. Neither the statutes nor the ordinances of the city for the preservation of the public health make provision for a hearing before the board or otherwise of the person charged with maintaining a nuisance, source of filth, or cause of sickness. The board or its members or officers may abate and re-

move the nuisance, source of filth, or cause of sickness without any such hearing, even though such proceeding necessitates the destruction of private property.

The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life. Under such circumstances it has been held that the legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health, and, if necessary, go to the extent of destroying private property when the emergency demands: *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; *Salem v. Erie Ry. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. The power to summarily abate nuisances ¹⁵⁶ was fully recognized and established as a principle of the common law, upon the ground that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be attained. Within this principle, "quarantine and health laws have been enacted from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality": *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385; *Sentell v. New Orleans etc. Ry. Co.* 166 U. S. 698, 17 Sup. Ct. Rep. 693, 41 L. ed. 1169; *Hart v. Mayor*, 9 Wend. 571, 24 Am. Dec. 165; *Health Dept. v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833; *Rockwell v. Nearing*, 35 N. Y. 308.

The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only in many instances be effectually dealt with by the destruction of the animals afflicted.

Respondent insists that he has the legal right to recover his damages since the property was not in fact a nuisance, source of filth, or a cause of sickness, as contemplated by the statute for the preservation and protection of the public health. This presents the inquiry whether the determination of the health

officers that a nuisance or cause of sickness dangerous to health in fact existed is a final determination, binding upon respondent as owner of the property which the health officer decided must be destroyed in order to abate the nuisance and remove the cause of sickness.

The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes of the law—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger¹⁵⁷ to health—yet it is no protection for destroying private property which in fact is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property can be adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it. In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the conditions which the statutes declare they may abate or remove: *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385; *Cole v. Kegler*, 64 Iowa, 59, 19 N. W. 843; *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320; *Health Dept. v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, and cases; *Orlando v. Pragg*, 31 Fla. 111, 34 Am. St. Rep. 17, 12 South. 368, 19 L. R. A. 196.

It is urged that no action can be maintained to charge appellant for the value of the property because in ordering its removal and destruction he was in the exercise of his official duty as city health officer. The laws for the preservation of

the public health make no provision for the payment of property so destroyed by mistake on the order of health officers. The question then arises, Who is liable for the value of this property under the facts and circumstances of this cause?

The jury found that the steer was not afflicted with a contagion, and that the beef and hides destroyed were not infected ¹⁵⁸ with anthrax. It is clear that the city is not liable under the decisions of this court. In the case of *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411, it is said: "In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefit or pecuniary advantage in its corporate or private capacity: *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760, and cases cited."

As here indicated, under the laws of this state no liability on the part of a municipality arises for injuries resulting from the acts or default of its officers while performing a duty imposed upon it as a governmental agency for the public at large: *Durkee v. Kenosha*, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420.

Appellant contends that he is not liable in this action upon the ground that the powers vested in members and officers of a board of health are discretionary in character, and that the duty of determining what are causes of sickness affecting the public health are quasi judicial in character. The acts of appellant, as appears from the above statement of facts, were within the scope of his duty as health officer, and come within the class of quasi judicial acts. It is the general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption: *Dillon on Municipal Corporations*, sec. 277, and note; *Steele v. Dunham*, 26 Wis. 393; *Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571; *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369; *Gates v. Young*, 82 Wis. 272, 52 N. W. 178. The facts and circumstances show, however, that respondent's private property rights have been unjustifiably invaded, and that he will be remediless

in the ¹⁵⁹ law, unless it be that appellant and those who actually committed the trespass in wrongfully destroying his property are liable. Under such circumstances quasi judicial officers have been held liable to respond in damages upon the ground that the exercise of this discretion is limited by the superior right guaranteeing to every person immunity from having his private property rights invaded except under the regular course of law, sanctioned by the established customs and usages of the courts. The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law affords no redress other than an action against the one actually committing the trespass: *Hubbell v. Goodrich*, 37 Wis. 84; *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39; *Cubit v. O'Dett*, 51 Mich. 347, 16 N. W. 679; *Miller v. Horton*, 152 Mass. 541, 23 Am. St. Rep. 850, 26 N. E. 100, 10 L. R. A. 116; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; *McCord v. High*, 24 Iowa, 336. The circuit court proceeded upon this principle, and held appellant liable in damages resulting from the destruction of the property, because it was not in fact a nuisance or cause of sickness endangering the public health. This course is assailed by appellant upon the authority of *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539. This was an action against the defendant, as meat inspector of the city of Milwaukee, for the destruction of a quantity of fish as unwholesome for food. The action was upon the ground that his acts were without authority, but the court held that he had authority to inspect fish, and judge whether they were a proper article of diet, and to destroy them if he found they were unwholesome. It is stated in the opinion: "He is vested with the power to determine the quality and healthfulness of fish in the market, and, if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, . . . and the officer exercising such a power is within the protection of that principle that a judicial officer is not responsible in an action for ¹⁶⁰ damages to anyone for any judgment he may render, however erroneously, negligently, corruptly or maliciously he may act or render it, if he acts within his jurisdiction"; citing, among the authorities in support of this proposition, *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

The decision arose on demurrer, and seems to assume that the fish destroyed were in fact unwholesome, and not a fit article of diet. Under this assumption of fact the decision was in accord with the doctrine that health officers are not liable in damages for destroying property when such property is in fact a source of danger to the public health. The opinion, however, seems to go upon the ground that such quasi judicial officers are under all circumstances absolutely protected from liability to the owner of the property, and are entitled to the same protection as an officer of a judicial tribunal in the discharge of official action within his jurisdiction. This is not the rule established under the adjudications. Upon the authorities cited and the reason advanced therein the rule is: "Inasmuch as the law quite universally protects private property, . . . the judgment or discretion of a quasi judicial officer, though exercised honestly and in good faith, does not protect him where, by virtue of it, he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer": *Mechem on Public Officers*, sec. 642, and cases cited.

In so far as *Fath v. Koeppel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539, is in conflict with this conclusion, it must be deemed overruled.

Appellant assigns error upon numerous rulings of the trial court in admitting testimony over his objection and rejecting testimony offered by him. We have examined every exception brought to our attention, and find the court's rulings are correct. Many of the exceptions urged are immaterial under the final disposition of the questions litigated and the grounds upon which judgment was awarded.

It is contended the court erred in answering the following ¹⁶¹ question in the special verdict: "Did the defendant cause the destruction of the hides and beef?" The court answered it in the affirmative. An examination of the evidence shows there was no conflict as to the fact that appellant made the written order directing the destruction of the hides and beef, that he gave personal directions and instructions to the deputy health officer and others who actually destroyed the property, and that these persons acted and proceeded under his order and direction. This fully establishes the grounds which justify this answer to the question.

The evidence adduced fully sustains the findings of the jury.

Upon the grounds stated, respondent was entitled to a judgment for the value of the property destroyed.

By the Court. The judgment of the circuit court is affirmed.

The Liability of Health Officers for destroying property and abating nuisances, on the ground that the public health is menaced thereby, is discussed in the monographic note to Blue v. Beach, 80 Am. St. Rep. 214-231. As to their liability for killing diseased animals, see Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113.

BEARDSLEY v. SCHMIDT.

[120 Wis. 405, 98 N. W. 235.]

A FACTOR has Implied Authority to sell in his own name, and in that name to maintain an action for the purchase price. (p. 992.)

A FACTOR has, as Agent of the Principal, in the Absence of Some Stipulation to the Contrary, a Special Interest in the Property and its proceeds, and the right to control the same until he receives his compensation for his services rendered in respect thereto. (p. 993.)

A FACTOR is to be Deemed a Trustee of an Express Trust, and as such, entitled to sue in his own name for the purchase price of property sold by him for his principal, under a statute providing that a trustee of an express trust may sue without joining with him the person for whose benefit the action is brought. (p. 993.)

WHERE A FACTOR Sues for the Purchase Price of Property Sold by Him for His Principal, the latter may control the litigation subject to due protection of the factor's special interest, unless such interest, consisting of legitimate charges against the property or its proceeds, equals, or is in excess of, the amount recoverable. (p. 993.)

FACTORS.—It is not Essential to the Right of a Factor to Sue in His Own Name that he should have sold in that name. (p. 993.)

A FACTOR is an Agent Employed to Sell, or to Purchase and Sell, goods or other personal property intrusted to his possession for compensation, commonly called factorage or commission. (p. 994.)

FACTORS, Who are.—Persons who have first received goods as warehousemen, but are afterward authorized to sell them on commission, with instructions to use their own judgment as to the best obtainable price, are factors. (p. 995.)

THE FACT THAT FACTORS Before Accepting an Offer for Goods Submit It to Their Principal for His Approval does not deprive them of the character of factors, nor of their right to sue for the purchase price in their own names. (p. 995.)

Action to recover the purchase price of cement sold by the plaintiffs to the defendants. The plaintiffs, as warehousemen, received this cement from the Eastern Minnesota Railway Company, but W. T. Bradley & Co., of Philadelphia, were the owners. The plaintiffs were commission merchants as well as warehousemen. The owners directed the plaintiffs to find a market for the cement and to dispose of it in large lots, if possible, and account to the owners from month to month. The plaintiffs were to make the sales on commission, using their own judgment as to the best obtainable price. When the defendants made an offer for the cement, they were informed that such offer must be submitted to the owners. It was afterward submitted and accepted, the name of the owners not being disclosed during the transaction. The property was billed to the defendants. At the commencement of the action, the plaintiffs' charges for storage and commissions remained unpaid. The trial court, on these facts being disclosed, directed the dismissal of the action, and the plaintiff appealed.

Luse, Powell & De Forest, for the appellants.

Archibald McKay, for the respondents.

408 MARSHALL, J. This appeal is governed by a few familiar principles. The trial court seems to have decided the case upon the theory that since appellants were agents for the owners of the cement in making the sale, the latter are the real parties in interest to enforce payment for the property by judicial proceedings. Counsel for respondents concedes that if appellants were factors and exercised the implied authority incident to such character to sell the property, and made the sale in their own names, they are the real parties in interest to enforce collection of the indebtedness. That has often been ruled by this and other courts, and indeed, is elementary, and that too without the element, necessarily, of a sale in the name of the factor: *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267; *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378, 19 N. W. 530; *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; *Kellogg v. Costello*, 93 Wis. 232, 67 N. W. 24; *Delafield v. Smith*, 101 Wis. 664, 70 Am. St. Rep. 938, 78 N. W. 170; *McCobb v. Lindsay*, 2 Cranch C. C. 215, Fed. Cas. No. 8704; *Graham & Co. v. Duckwall*, 8 Bush, 12; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Hearshy v. Hichox*, 12 Ark. 125; 8 Ency. of Pl. & Pr. 829; *Mechem on Agency*, sec. 1039; *Story*

on Agency, sec. 112; Reinhard on Agency, sec. 453. This implied authority of the factor to sell in his own name and to maintain an action in his own name to recover the purchase price grows out of the fact that the nature of the relations between the principal and the agent, and the latter and the purchaser, are such that, as between the two latter, the agent is deemed to be the owner of the property. He has, as against his principal, in the absence of some stipulation to the contrary, a special interest therein and the proceeds thereof, and the right to control the same till he receives his compensation for services rendered in respect thereto: Story on Agency, sec. 111. He is also, as to the principal, deemed to be a trustee of an express trust under the provisions of the statute (Stats. 1898, sec. 2607; Reinhard on Agency, sec. 453; 8 Ency. of Pl. & Pr. 829, note 1; Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 539; Considerant v. Brisbane, 22 N. Y. 394; Bliss on Code Pleading, 59), and as such is authorized to sue for the purchase price by the exception to section 2605 of the Statutes of 1898. Section 2607 of the Statutes of 1898, provides: "A trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

In either case the principal can control the litigation if he sees fit, subject to the due protection of the factor's special interest, unless such interest, consisting of legitimate charges against the property, or the proceeds thereof, are equal to or in excess of the amount recoverable: Reinhard on Agency, sec. 453; 12 Am. & Eng. Ency. of Law, 2d ed., 691. It is not essential to the right of the factor to sue in his own name that he shall sell in his own name, as counsel seems to think, basing his faith on Price v. Wisconsin etc. Ins. Co., 43 Wis. 267. It is there said: "A factor selling goods for his principal in his own name can sue in his own name for the price"; citing Story on Agency, sec. 110. That text of Story contains no such restriction—in fact, contains nothing about the right of the factor to sue in his own name. It seems it was inadvertently referred to in a way likely to mislead. What the author says on the subject is contained in sections 34, 11, 110, 111, and 112, and is to the effect that a factor has implied authority to sell in his own name and to sue in his own name for

the purchase price of the property sold subject, however, to the right of the principal, as before stated, to control the litigation if he sees fit, so far as his own interest is concerned. The right to sue is not put in the conditional in Story; neither is it in the cases decided by this court since *Price v. Wisconsin M. F. Ins. Co.*, 43 Wis. 267; ⁴¹⁰ *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; *Kellogg v. Costello*, 93 Wis. 232, 67 N. W. 24. By force of the statute alone, as we have seen, a factor has the right to sue in his own name. That appears sufficiently from the plain language quoted. Moreover, that is the meaning attributed to similar statutes elsewhere, as will be seen by referring to the cited cases. That is not referred to in the previous decisions of this court, except in *Robbins v. Deverill*, 20 Wis. 142, where nothing definite was said. Since that case was decided it has become well recognized that the code provision had for its purpose, in part, the preservation of the old practice as to factors: *Bliss on Code Pleading*, 59. It must not be understood that a factor is a trustee of an express trust in the strict sense of the term. He is such under section 2607 of the Statutes of 1898, because there in effect so declared. That subject will be found fully discussed in *Considerant v. Brisbane*, 22 N. Y. 394.

If it was essential to the right of plaintiffs to sue in their own names that they should have sold in their own names, it seems that the evidence in the record is conclusive in their favor. The owners of the property were not mentioned in the negotiations leading up to the sale, nor in the consummation thereof, while the names of appellants were used on every occasion for using the name of anyone on the side of the sellers.

The only question left to be determined, in any view, is, Did appellants handle the property as factors? A factor is said to be "an agent employed to sell or to purchase and sell goods or other personal property intrusted to his possession, . . . for a compensation commonly called factorage or commission": *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378, 19 N. W. 530. "An agent who, for a commission, sells goods for his principal, which the latter has consigned to him": *Reinhard on Agency*, sec. 449. That seems to accurately describe the situation of appellants in respect to the property in question, ⁴¹¹ beyond reasonable controversy. True, it was received by them from the railway company, but they were brought into contractual relations with the owners thereof thereafter, and acted by express authority from the latter, "to

take and handle the property on commission." The fact that respondents' proposition to purchase the property was not acted upon by appellants without submitting the same to the owners of the property for approval is without significance. Possession of the property, with authority to sell it in the capacity of commission merchants, made them factors, with the implied authority incident thereto, and also made them trustees of an express trust with the right to bring this suit, regardless of whether they received the property directly from the owners, or whether the sale was required to be made upon approval of the owners; or whether the same was so made, or whether they did or did not at the time of the sale disclose the names of the owners: *Ilsley v. Merriam*, 7 Cush. 242, 54 Am. Dec. 721. As soon as appellants assumed in regard to the property the status of commission merchants, they acquired a special interest therein which was increased by the continuance of their possession and their services in making the sale, giving them the right, within all the authorities, to bring this action and to control the litigation, since there is nothing to indicate that such control is contrary to the wishes of the owners of the property. It follows that the judgment appealed from must be reversed.

By the Court. The judgment is reversed, and the cause remanded for a new trial.

Since a Factor has a special ownership in goods consigned to him, he may sue in his own name for their price when he sells them; and under the reformed procedure a factor who contracts in his own name on behalf of his principal is a trustee in an express trust, and may sue in his own name for the price. A factor may also maintain trover, trespass or replevin: See the monographic notes to Bigelow v. Walker, 58 Am. Dec. 168; Aetna Powder Co. v. Hildebrand, 45 Am. St. Rep. 209.

CUPPS v. STATE.

[120 Wis. 504, 97 N. W. 210, 98 N. W. 546.]

MURDER in the First Degree.—It is sufficient to sustain a verdict of murder in the first degree that the evidence tends to prove that the person committing the homicide had, at the time of inflicting the fatal wound, a design to take human life and inflicted the wound for the purpose of accomplishing that design, from which death ensued, there being no circumstance to render the homicide excusable or justifiable. (p. 1003.)

MURDER in the First Degree, Presumption to Support Verdict of.—From the circumstance of the taking of the life of a human being by an act of a nature naturally and probably calculated to cause death, the law presumes that he who perpetrated the act foresaw and intended the result which followed, and must hence be guilty of the highest offense of criminal homicide known to the law, in the absence of evidence showing that the homicide was justifiable or excusable, or sufficiently rebutting the presumption of intent to take human life to raise a reasonable doubt on the question. (p. 1003.)

MURDER in the First Degree—Evidence Sufficient for the Prosecution.—When it is made to appear in a prosecution of an indictment for murder that the accused fired the fatal shot, the weapon being aimed at a vital part of the body, and that death ensued as a natural and probable result, the presumption of fact as to the intention to take human life, in the absence of explanatory circumstances or evidence, makes a prima facie case for the prosecution. The state need not negative any probability that the offense was the result of an accident, or that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying him altogether. (pp. 1003, 1004.)

MURDER—Burden of Proof, When Must be Assumed by the Accused.—When the evidence, on the prosecution of an indictment for murder, shows the killing of the decedent by the accused by shooting, and that the weapon was aimed at a vital part of the body, the accused must then assume the burden of proving that there was no intent to take life, or that the killing was justifiable or excusable, or, at least, of raising a reasonable doubt in his favor. (p. 1004.)

MURDER.—In the Absence of Evidence to the Contrary, He Who Takes the Life of Another by the inflicting of a wound or some act naturally and probably calculated to produce death is presumed to have intended that result, and to be guilty of murder in the first degree at the common law and under the statutes of Wisconsin. (pp. 1004, 1005, 1019.)

MURDER at the Common Law was Susceptible of Being Established by the presumption arising from the fact of killing by an unexplained act naturally and probably calculated to produce death. (p. 1005.)

MURDER in the First Degree, Under the Statutes of Wisconsin, may be Established, as may murder at the common law, by evidence showing the killing of one human being by another by the unexplained act of the latter, naturally and probably calculated to produce death. (pp. 1005, 1019.)

MURDER.—Absence of Known Motive on the Part of an Accused does not show a conviction of murder in the first degree to be unwarranted when the evidence clearly, in the judgment of the jury, established an intention, without justification or excuse, to destroy human life. (p. 1006.)

MURDER—Evidence of Motive or Want of Motive in Prosecutions for.—While it is competent for the prosecution under an indictment for murder to show motive, it will not of itself establish the charge; and, while it is competent for the defense to establish want of motive, it does not constitute a defense nor necessarily rebut evidence by itself satisfactorily establishing the guilt of the accused, even so as to raise a reasonable doubt on the question. The presence or absence of motive is but a mere evidentiary circumstance to be given such weight by the jury as they deem it entitled to under all the circumstances. (p. 1007.)

MURDER.—Evidence of the Good Character of the Accused does not render his conviction of murder in the first degree unjustifiable where the evidence is sufficient to satisfy the jury beyond a reasonable doubt that he killed a human being by an intentional act naturally and probably calculated to produce death. (p. 1008.)

TRIAL—Answer to Question, When may be Stricken Out as not Responsive.—If a witness, on being asked as to the reputation of an accused as a peaceable, law-abiding citizen, answers, "In every respect it was good," the answer may be stricken out so far as not responsive to the question asked. (p. 1008.)

TRIAL—Invasion of Province of the Jury.—A recital by the court in its instructions to the jury of numerous facts as to which the evidence was all one way is not an invasion of the province of the jury. (pp. 1008, 1009.)

TRIAL—Mistake of Court in Stating Evidence, When not Prejudicial.—A statement by the court in an instruction to the jury on a trial for murder that the accused and a companion walked when returning to a particular place, when the evidence shows that they ran, is not prejudicial, when the inference to be drawn from their walking must necessarily be more favorable to the accused than from their running, as where from all the evidence being one way the jury must have understood the court merely to mean that such return was on foot. (p. 1009.)

MURDER—Taking from the Jury the Question Whether the Killing was Justifiable, When not Improper.—An instruction on a trial for murder that there is no evidence tending to show, and that there is no claim made, that the defendant killed the decedent under such circumstances as rendered the killing justifiable or excusable, and that the defendant insists that he did not contribute to the death of the decedent, and hence that the only question to be determined is whether the defendant killed the decedent, and if he did, then was such killing perpetrated pursuant to a premeditated design to take human life, is not erroneous, though it takes from the jury the question whether the killing was justifiable or excusable, if in fact there was no evidence tending to show that it was so. (pp. 1009, 1010.)

TRIAL—Reference to Facts in Instructions to the Jury.—The court may, even in a criminal trial, properly speak of evidentiary facts as established as to which the evidence is so conclusive as not to leave any room for debate in respect thereto. (p. 1010.)

TRIAL—Confining Consideration of the Jury to Question Whether Murder in the First Degree has been Committed.—Where the evidence in a prosecution for murder in the first degree will support the full charge and in no reasonable view of it will support conviction for any less homicidal offense, it is competent for the court to say that to the jury and to restrict their deliberations accordingly. (p. 1010.)

TRIAL—Mode of Obtaining the Submission to the Jury of the Degree of Crime in a Homicide Case.—A general exception to the submission of only murder in the first degree does not raise the question of whether a lesser degree of homicidal offense should be submitted. The only way this can be done is by specially requesting the court to instruct the jury as to the lesser degree. (p. 1011.)

TRIAL—Murder—Instruction to the Jury—Omission of the Word "Care."—The court may properly refuse to instruct the jury, on a trial for murder, that they must scrutinize the evidence with the utmost caution and care, if it does instruct them that in scrutinizing the evidence they should exercise the utmost caution, employ all the reason, prudence, judgment, and discrimination that they possess and would summon to their aid in the most important affairs of life. (pp. 1012, 1013.)

TRIAL for Murder—Testimony of an Accomplice.—The accused is not entitled to an instruction advising the jury against a conviction on the uncorroborated testimony of an accomplice, if there is much circumstantial evidence pointing the same way. (p. 1013.)

TRIAL by Jury—Omission of Charge upon a Subject When No Request Therefor has been Made.—Where the charge of the court does not cover all the phases of the case, counsel must call its attention to the omission by an appropriate request, or be precluded from making such failure available as reversible error. A merely oral request is not sufficient. Counsel must present an additional instruction in writing on any particular point upon which he desires the court to charge. (pp. 1013, 1014.)

NEW TRIAL—Decision of the Trial Court on Motion for, When Conclusive.—If there is a motion for a new trial on the claim that one of the jurors testified falsely on his voir dire as to the fact of his having previously formed an opinion respecting the defendant's guilt, and the evidence, on the hearing of the motion, is conflicting as to the existence of such ground, a question of fact is thereby presented for consideration, the decision of which by the trial court is conclusive, unless it satisfactorily appears by the record to be against the clear preponderance of the evidence. (p. 1016.)

JURY TRIAL—Actions by Third Persons Which cannot be Held to Unfairly Influence.—The fact that a person in no way interested in a criminal trial passes the jurors during the trial, says, "Good morning," and gives the officer in charge a small sum, with instructions to expend it for cigars for the use of the jurors, and that it is so spent, while it shows improper conduct on the part of the giver and the officer, does not warrant the disturbing of the verdict subsequently reached. (pp. 1017, 1018.)

MURDER in the First Degree.—Where there is an intent to kill, the homicide is murder in the first degree, if not excusable nor justifiable, because all the deliberation necessary is involved in the formation of the purpose to kill before the perpetration of the fatal act. This formed design or intent need not exist at any appreciable time or time sufficient for the intervention of any independent element between it and the fatal act. (p. 1025.)

MURDER.—The Word "Premeditated," as used in the statute, on the subject of felonious homicide, has no other signification than that the design to kill must precede the homicidal act. (p. 1025.)

Joint information against the defendant Cupps and Ole Gustad for the murder of Mrs. Ollie O'Dell. Separate trials were demanded and granted. Gustad, being first tried, was acquitted. Cupps was soon afterward tried and convicted of murder in the first degree, and prosecuted a writ of error.

R. J. MacBride, for the plaintiff in error.

The attorney general, and Walter D. Corrigan, second assistant attorney general, for the defendant in error.

⁵⁰⁸ **MARSHALL, J.** The main contention upon which counsel for plaintiff in error relies for a reversal is that the evidence was not sufficient to warrant a conviction of murder in the first degree if of any offense; though it does not seem to be urged with confidence but that the evidence justified a conviction of guilty of some homicidal offense. Preliminary to the discussion of such contention we will briefly state the salient evidentiary facts which the testimony either established or so strongly tended to prove as to warrant the jury in finding their existence.

Ole Gustad and plaintiff in error were young men. The latter was about twenty years of age. He lived a reputable life till about a year prior to the homicide. Gustad was twenty-three years of age. For several years prior to the homicide he had associated with bad characters and generally lived a disreputable life. In June, 1899, or a month or two prior thereto, plaintiff in error, at St. Paul, Minnesota, began to associate with Iva Drake, an unmarried woman, knowing that she was of bad character and pregnant. She gave birth to a child shortly after such acquaintance commenced. He married her prior to July, 1899. During the time he associated with her prior thereto she had a companion of bad character by the name of Ella Day, a favorite of Ole Gustad. The acquaintance of plaintiff in error with the latter commenced after he began to associate with Iva Drake. After that event the two young men chummed together, more or less, till after the homicide. After plaintiff ⁵⁰⁹ in error and the Drake woman were married they spent several months going about from place to place, apparently not having any honorable means of support. In company with Ella Day they arrived at Stanley in the latter part

of October, 1899. On the morrow a livery rig and driver were procured, and the two girls with plaintiff in error, were driven out of the village, a short distance, to Mrs. O'Dell's house of ill-fame. Plaintiff in error knew the character of the house. He left his wife there apparently consenting that she should remain and encouraging her to do so and to live the life common to such places, he returning to Stanley, where he resided for several weeks, doing nothing but taking care of a little child of Ella Day, the two girls paying his expenses from the fruits of their immoral life. At the end of that period Gustad joined him and the two went to St. Paul to obtain work. About a week after they arrived in St. Paul they returned to Stanley, leaving St. Paul on the evening train of November 26th, and arriving in Stanley a little before 12 o'clock P. M. of that day. Cupps had upon his person a revolver. Gustad had no weapon. When the two arrived at Stanley they avoided being observed by the train crew. When the train moved out of the station they went into the waiting-room of the depot and sat down by the stove, indicating by their manner a disposition to avoid being recognized. After remaining there about an hour, at the suggestion of Cupps they started for the O'Dell place, where they arrived at about 2 o'clock A. M. One of them immediately rapped at the door and it was promptly opened by Mrs. O'Dell. She was the only person in the lower part of the house. Mrs. Cupps, the Day girl, and one Anna Wing were upstairs and were the only occupants of the house except the O'Dell woman. The Day girl was in a room by herself at the head of the stairs. As soon as Mrs. O'Dell opened the door a noise as of persons entering the house was heard, and immediately thereafter the O'Dell ⁵¹⁰ woman was heard to exclaim: "My God! Don't shoot me!" or words to that effect. Immediately thereafter a pistol shot was heard, followed by an exclamation from the woman: "They have killed me, they have killed me!" or words to that effect. Sounds as of the persons who entered the house hurriedly leaving the same were then heard. The woman was then heard to groan several times, and thereafter all was still in the lower part of the house. The girls remained upstairs till morning. They then called to a passer-by, resulting in an investigation being made and Mrs. O'Dell being found where she was last heard, lying upon the floor dead, with a pistol wound in her neck. Immediately after the shooting Cupps and Gustad hurriedly returned to Stanley, where they secreted themselves behind some

box-cars till a train arrived, bound for St. Paul. They boarded the train, avoiding being observed by the train crew, and beat their way to St. Paul, arriving there before noon. Soon thereafter plaintiff in error sold his revolver, saying that he had no further use for it. About a week after they returned to St. Paul the two men were arrested, charged with being guilty of the murder of the O'Dell woman. After the arrest plaintiff in error claimed that he was not at Stanley on the night of the homicide. On the preliminary examination he admitted that he and Gustad visited Stanley on the night of the homicide and that they both started for the O'Dell place. He claimed, however, that he had some altercation with his companion, which resulted in his turning back while Gustad went on; that he was not present at the O'Dell place at the time of the shooting; that Gustad overtook him before he arrived at Stanley and that the two soon thereafter reached Stanley, boarded a passing train, and went to St. Paul. He claimed that he did not know that the O'Dell woman was shot, but suspected it. His story in justice court was different in many respects from the one he told upon his trial in the circuit court. He then admitted being present when the ⁵¹¹ woman was shot and said that his testimony in justice court inconsistent with that given upon his trial was false. He claimed that while the two were on their way to the O'Dell place Gustad borrowed his revolver ostensibly to shoot at something by the wayside; that he discharged the weapon and then reloaded it, having in his possession some cartridges which belonged to the accused; that he returned the revolver to the accused shortly after they left the O'Dell place. He testified that as soon as they entered such place Gustad drew the revolver and shot the woman; that he was then about to go upstairs in search of his wife, and that the woman, when shot, was directly between him and Gustad, facing the latter. Gustad denied having the revolver in his possession on the night of the homicide at all. He testified that plaintiff in error, as soon as they entered the O'Dell house, drew his weapon and shot the woman. Both agreed that immediately after the shooting they hurriedly returned to Stanley secreted themselves till a train came along, and then boarded the same for St. Paul, reaching there as before stated.

The foregoing statement seems to be sufficient, without argument, to answer counsel's contention that there was no evidence produced upon the trial to warrant the jury in finding a verdict of murder in the first degree. True, the direct evi-

dence as to who did the shooting was confined to the two men, the accused and his companion, who were the sole witnesses of the homicide; but there were evidentiary circumstances tending to show that plaintiff in error was the guilty party and that the two visited the O'Dell place upon the night of the homicide, one or both being bent upon an unlawful purpose of a serious nature, and probably the one that was effected. There was the evidence tending to show that both endeavored to avoid recognition while at Stanley; that they purposed, before leaving St. Paul, to go to Stanley and return in such a way as to render their absence from St. Paul unobservable; that plaintiff in error was the leader of the ⁵¹² expedition; that he owned and was in possession of the weapon with which the homicide was committed, and that his story of the shooting was highly unreasonable in that he claimed that, when Gustad fired the shot, the woman was standing in a direct line between them, face to face with Gustad. As before stated, however, on the question of who did the shooting, we do not understand that counsel for appellant contend but that there was evidence to warrant the jury in finding that plaintiff in error did it; the point argued being that no evidence was produced showing that the shot was fired with the intention to take human life, requisite to the crime of murder in the first degree. To our minds the evidence on that point seems to have been ample to warrant the jury in the conclusion which they reached. The location of the wound indicates that it was inflicted with a pistol pointed at the woman's neck and probably slightly downward. Whoever fired the shot must have had his arm raised to a position quite inconsistent with an accidental discharge of the pistol during a struggle between him and the woman. There were no powder-marks upon the deceased, indicating quite clearly that she and her assailant were not near enough together at the time of the homicide to be in physical touch with each other. The location of the wound and the other circumstances strongly indicated that the wound was intentionally inflicted. It was in a vital part of the body, giving rise to the familiar legal presumption that whoever inflicted it intended to produce the result which followed, such result being a natural and probable consequence of the act. Add to that fact that the woman exclaimed the instant before the shot was fired, "My God! Don't shoot me!" and exclaimed immediately after the discharge of the pistol, "They have killed me, they have killed me!" or words to that effect, and we have a pretty

strong showing that whoever fired the fatal shot did so intending to accomplish what in fact resulted. That satisfies all the essentials of murder in the first degree, ⁵¹³ though there may not have been any definite or considerable period of time between the formation of the design to kill and the effectuation thereof. It is sufficient to satisfy the statute if the person committing the homicide has, at the time of inflicting the fatal wound, a design to take human life, and inflicts such wound with the purpose of accomplishing such design, and that death ensues, there being no circumstance to render the homicide excusable or justifiable: *Hogan v. State*, 36 Wis. 226, 244; 30 Wis. 428, 11 Am. Rep. 575; *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593.

While, on account of the evidentiary circumstances to which we have alluded, aside from the fact of killing by means naturally calculated to effect death, the case as to the degree of criminal homicide of which the person who fired the fatal shot was guilty did not depend upon the presumption arising from the fact of killing and the manner thereof, in that it was by means naturally and probably calculated to produce death, if it did so depend we could not agree with counsel that such presumption goes only to the question of whether the homicide was criminal or not; that it was not sufficient to prove the character of the offense. From the circumstance of the taking of the life of a human being by the act of another naturally and probably calculated to cause that result the law presumes that such person, when he perpetrated the act, foresaw and intended the result which followed, hence must be guilty of the highest offense of criminal homicide known to our law, in the absence of evidence showing that the homicide was justifiable or excusable, or sufficiently rebutting the presumption of intent to take human life, to raise a reasonable doubt on the question. That must be so, since under our statute every intentional taking of human life not excusable or justifiable is murder in the first degree: *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593. When it is made to appear in the prosecution of a case like this that the accused fired the shot, the weapon being aimed at a vital part of the ⁵¹⁴ body, and that death ensued as a natural and probable result, the presumption of fact as to intention to take human life, in the absence of any explanatory circumstance or evidence, makes a prima facie case for the prosecution. The state is not bound to go further and negative any probability that the occurrence was the result

of accident, or that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it altogether. The accused at that point must take up the burden of rebutting the *prima facie* showing made against him. He must show, by evidence at least sufficiently convincing to raise a reasonable doubt as to the intention to take human life or as to whether such taking was justifiable or excusable, that there was no such intention, justification or excuse, or the jury will be justified in finding him guilty of the highest offense of criminal homicide. That rule is elementary. We quote from 3 Greenleaf on Evidence, section 14: "This rule, that every person is presumed to contemplate the ordinary and natural consequences of his own acts, is applied even in capital cases. Because men generally act deliberately and by the determination of their own will, and not from the impulse of blind passion, the law presumes that every man always thus acts, until the contrary appears. Therefore, when one man is found to have killed another, if the circumstances of the homicide do not of themselves show that it was not intended, but was accidental, it is presumed that the death of the deceased was designed by the slayer; and the burden of proof is on him to show that it was otherwise."

That burden is successfully raised, as we have seen, if the accused produces evidence sufficient in the judgment of the jury to raise a reasonable doubt as to the felonious intent. This subject was very fully discussed by Chief Justice Shaw, in *Commonwealth v. York*, 9 Met. 93, 43 Am. Dec. 373. The conclusion there reached is fairly stated in the syllabus thus: "When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, ⁵¹⁶ and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant."

By reference to the opinion it will be seen that the term "murder" in the syllabus means killing with malice aforethought, or murder in the first degree under our statute. That is stating the rule broader than is necessary for the purposes of this case, and broader than we would advise giving it to a jury. The better way is to state that, in the absence of evidence to the contrary, he who takes the life of another by the infliction of a wound or some act naturally and probably calculated to produce death, is presumed to have intended that result and to be guilty of murder at the common law, and mur-

der in the first degree under our statute. Chief Justice Shaw, speaking of the nature and force of the presumption, said: "The willful and voluntary act of destroying the life of another is injurious in the highest degree to the rights of such other. . . . The natural and necessary conclusion from such an act willfully done, without apparent excuse, is that it was done *malis animo*, in pursuance of a wrongful injurious purpose, previously, though perhaps suddenly, formed, and is therefore 'a homicide with malice aforethought': Page 104.

"The presumption of malice, is not technical or artificial, but is the result of a mode of legal reasoning which is of general application": Page 105.

Counsel for plaintiff in error freely admits that the law is as thus stated as applied to murder at the common law, but insists that the rule is different under our statutory system. No very good reason is advanced to support that idea, and no authority in support thereof is cited. Murder at the common law was susceptible of being established solely by the presumption arising from the fact of killing by an unexplained act naturally and probably calculated to produce death. That was laid down distinctly as early as *King v. Woodburne*, in 1722, 16 How. St. Tr. 54. We see no room for holding that such ancient rule, which obtains to this day, admittedly, as to murder at the common law, does not apply to our statutory murder in the first degree, since that includes every intentional killing of a human being by another, not justifiable or excusable. Decisions made under systems unlike ours necessarily cannot affect the question. The law is different in the state of Ohio, and perhaps in other states. The difference in Ohio, however, grows solely out of the fact that intentional killing under the Ohio statutes is a characteristic of murder in the second as well as in the first degree. In that situation the court held that the presumption of intention to take human life arising from an unexplained homicide should only go to the lowest degree of the offense in which the intent to kill was essential: *State v. Turner, Wright* (Ohio), 20.

Now, while the jury were warranted in finding many evidentiary circumstances corroborating the legal presumption from the fact of killing by an act naturally calculated to produce that result—which we have seen was of itself, unexplained, sufficient to support the finding of the taking of human life with malice aforethought—we are unable to discover any evidence or circumstance tending to rebut the presumption except

that tending to show absence of motive. True, there was a feeble attempt to show a probable accidental discharge of the pistol, and, certainly, from the circumstances of the homicide which we have detailed and the appearances thereafter the jury were fully warranted in giving little or no credence thereto. No explanation whatever was attempted of why the revolver was drawn on the defenseless woman at all; while the location of the wound and the absence of powder-marks on the body of deceased or her clothing, and the entire absence of anything about her person indicating a struggle with her assailants, show pretty clearly, as before indicated, that the weapon was aimed at a ⁵¹⁷ vital part of her body and was intentionally discharged by the person who held it.

Much significance is claimed for the dearth of evidence showing any substantial motive for the commission of the offense. If in a case like this evidence of guilt were so weak as to necessarily leave a reasonable doubt in the mind on the question of guilt in the absence of any proof of motive for the deed, that circumstance would have all the significance claimed for it; but such is not the situation here. Absence of motive in a doubtful case is always significant and may be of controlling import. But where the evidence, in the judgment of the jury, clearly establishes an intention, without justification or excuse, to destroy human life, the fact that no adequate or any motive can be assigned for the deed does not militate against such act being criminal, nor against the degree of criminality being the highest known to the law. A conviction is never to be disturbed merely for want of motive where there is credible evidence of guilt: 1 McClain on Criminal Law, sec. 416. The expressions of courts on this subject are numerous and harmonious. In *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. Rep. 410, 38 L. ed. 208, it was said, in effect: Proof of motive for the crime is not indispensable to conviction; for murder may be inferred from the mere fact of killing; but the absence of evidence suggesting a motive is a circumstance in favor of the accused to be given such weight as the jury may deem proper. In *Clifton v. State*, 73 Ala. 473, the court said: "The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry. . . . But it is not in any case indispensable to a conviction; it is not an element of the burden of proof the law devolves upon the prosecution, whether the agency or connection of the accused is manifested by direct and positive evidence, or only by circumstantial evi-

dence, that a motive, or inducement, to commit the offense should be proved. The criminal act, and the connection of the accused with it, ⁵¹⁸ being proved beyond a reasonable doubt, the act itself furnishes the evidence that to its perpetration there was some cause or influence moving the mind."

In *McLain v. Commonwealth*, 99 Pa. St. 86, 99, the court, speaking on the same subject, said: "The commonwealth was not bound to establish an adequate motive for the alleged crime. . . . The fact of murder being established, the inability to discover the motive does not disprove the crime."

Thus it will be seen that while it is competent for the prosecution in a case of this kind to show motive, it will not of itself establish the charge; and while it is competent for the defense to establish want of motive, it does not constitute a defense, nor necessarily rebut evidence by itself satisfactorily establishing the guilt of the accused even so as to raise a reasonable doubt on the question. Presence or absence of motive in any case, as indicated, is but a mere evidentiary circumstance to be given just such weight by the jury as they deem the same entitled to under all the circumstances. So here, the failure of the prosecution to show any motive for the commission of the offense charged against the accused is of little moment, the jury having presumably given due weight thereto and the evidence being sufficient, notwithstanding the absence of any discoverable motive for the offense, to warrant the verdict which was rendered.

Counsel for plaintiff in error, to sustain his contention that the verdict of the jury was not warranted by the evidence, points with confidence to the proof of previous good character of the accused up to about a year before the commission of the offense. We must say that such evidence of good character was entitled to very little if any weight in view of the proof that the accused was a man of mature years, more than ordinarily bright, a man capable of earning upward of sixty dollars per month at mechanical labor, and yet that he took for his wife a common prostitute knowing her character, ⁵¹⁹ and thereafter encouraged her to continue her immoral life, he profiting by the fruits thereof, and it further appearing that he indulged in going about the country, beating his way on railroads and living the life of a common tramp. However, at best the evidence of good character did not constitute a defense. Counsel for the accused of course does not claim that for it. It was entitled to just such consideration as the jury thought proper to give to it under all the circumstances of the case—no more and no less. The fact

of previous good character, like that of absence of motive for the commission of the crime, is of no significance in any case in the face of satisfactory evidence of guilt, in the judgment of the jury, after giving due weight to such previous character. We must assume that there was such satisfactory evidence in the judgment of the jury in this case, since there is nothing to indicate that they did not give due weight to all the evidence produced before them. If they believed from such evidence beyond reasonable doubt that the accused committed the offense charged against him, it was their duty to render the verdict which they did, though they could not discover any motive for the deed, and though they believed that prior to the commission of the offense his character was inconsistent with such commission.

The only error assigned to rulings on evidence is that the court erred in granting a motion to strike out an answer which it appears was not responsive to any question asked. Arnold Lunt, after qualifying to testify as to the reputation of the accused as a peaceable, law-abiding citizen prior to the commission of the offense, in answer to a proper question said that it was good. Counsel for the accused, apparently to cause the witness to emphasize his answer to this question, asked: "His reputation in that respect was good?" referring to the reputation of the accused as a peaceable, law-abiding citizen, to which witness said: "In every respect it was good." That answer was clearly subject to the motion ⁵²⁰ to strike out. The motion was general. The specific ruling of the court was that the answer should be stricken out so far as not responsive to the question. True, the court said in connection therewith that the inquiry in respect to the character of the accused was only competent in respect to his reputation as being a peaceable and law-abiding citizen; but the ruling was as indicated. An exception to that did not raise the question which counsel argues. Whether the saying, as to a person on trial for the crime of murder, that only his character as a peaceable and law-abiding citizen is involved is strictly accurate, does not seem to arise so as to require discussion or decision.

The learned circuit judge, in the instructions to the jury, recited numerous facts as to which the evidence was all one way and which were unquestionably established, in which he said that after the homicide the accused and his companion walked back to Stanley. Counsel insists that such recital was an invasion of the province of the jury and was clearly preju-

dicial to the accused in respect to the statement that he and his companion walked back to Stanley, the testimony being that they ran back, indicating mental excitement. As to the general claim that it was error for the court to speak of facts as established in respect to which there was no debatable question, that was not an invasion of the province of the jury. Strictly speaking, the statement made by the learned court that the accused and his companion walked from the O'Dell place to Stanley was contrary to the evidence. The only testimony on the subject was that of accused and his companion. It is true, as counsel for plaintiff in error states, that both testified that they ran. However, we fail to see how the jury could reasonably have been prejudiced by such inaccurate statement. The men returned on foot to Stanley immediately after the homicide. In all reasonable probability, in view of the evidence, which was undisputed and very plain, that is what the jury understood ⁵²¹ was in the mind of the court. The act of running back to Stanley, after the homicide, in a state of excitement, was certainly more indicative of guilt than would have been an act of walking back with the unconcern which the language of the court would indicate, taking the same in its literal sense. However, as before indicated, the evidence being plain and all one way that the accused and his companion returned to Stanley on a run, the jury must have understood the court merely to mean that they returned, as they in fact did, on foot.

Error is claimed because the court instructed the jury: "There is no evidence in this case that tends to show, nor is any such claim made in the defendant's behalf, that the defendant killed the deceased under circumstances such as rendered such killing either justifiable or excusable. On the trial the defendant insists that he did not in any way contribute to the death of Mrs. O'Dell. The question, therefore, is to be determined by you from the whole evidence in the case, considered within appropriate legal rules as here stated by the court: Did the defendant shoot and kill Mrs. O'Dell, and, if he did, then was such killing perpetrated pursuant to a premeditated design by the defendant to take her life?"

That assignment of error raises the question of whether the court was warranted in taking from the jury the question of whether the killing of Mrs. O'Dell was justifiable or excusable. We are unable to perceive why the court was not so warranted, and the instruction objected to strictly proper. Counsel made no attempt to point out anything in the evidence indicating justifiable or excusable homicide. The whole attitude of the

accused, from first to last, was, as the court said in the instruction, inconsistent with any other theory than that he was guilty of murder in the first degree or not guilty. His story was that he did not do the deed or have any concern with it. There was no room whatever in the evidence, in any reasonable view of it, for a finding that he had any legal excuse or justification for killing the ⁵²² woman or injuring her in any way whatever. In that situation the court was justified, in fact it was its duty, to fence in the considerations of the jury as was done. A court in charging the jury in a criminal or any case is by no means confined to a mere statement of abstract principles of law applicable to the evidence. It may properly speak of evidentiary facts as established, as before indicated, as to which the evidence is so conclusive as not to leave any room for debate in respect thereto, and thus bring the minds of the jury to a definite understanding of the particular primary subjects for their consideration before taking up the ultimate issue of whether the accused is guilty or not. This and other courts have often held that where the evidence in a prosecution for murder in the first degree will support the full charge, and in no reasonable view of it will support a conviction for any less homicidal offense, it is competent for the trial judge to say that to the jury and to direct them to restrict their deliberations accordingly: *Fertig v. State*, 100 Wis. 301, 75 N. W. 960; *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321; *State v. Kilgore*, 70 Mo. 548; *State v. Stoeckli*, 71 Mo. 559. The limitation upon the right of a trial court to speak of facts as established in charging a jury has often been said to be that it must stop where in any reasonable view of the evidence there is room for debate as to where the truth lies: *Benedict v. State*, 14 Wis. 423; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *Dingman v. State*, 48 Wis. 485, 491, 4 N. W. 668; *Salladay v. Dodgeville*, 85 Wis. 318, 326, 55 N. W. 696, 20 L. R. A. 541; *Little v. Iron River*, 102 Wis. 252, 78 N. W. 416. The general view of this subject as held by the highest courts of the country is summed up in 11 Encyclopedia of Pleading and Practice, 116, thus: "An instruction which assumes the existence or nonexistence of material facts in issue invades the province of the jury, and is erroneous if there be any evidence in conflict with such assumption."

⁵²³ That statement could be improved upon, it seems, by using the expression: "If there is any evidence or want of evidence in conflict with such assumption," since the court cannot properly assume the existence of a material fact merely because there is no negative evidence on the subject. The assumption

in a criminal case must be based upon evidence establishing the fact so conclusively, as said in the decisions of this court before cited, as to leave no room for debate on the subject.

There is a further answer to that feature of the assignment of error last discussed which relates to the court instructing the jury to consider only the question of murder in the first degree: that, according to the repeated rulings of this court, the accused was not prejudiced, since no request was made for submission to the jury of other degrees of homicidal offenses than murder in the first degree. A general exception to the submission of only murder in the first degree did not raise the question of whether the lesser degrees of homicidal offenses should be submitted. The only way that could be done was by specially requesting the court to instruct the jury as to the lesser degrees: *Odette v. State*, 90 Wis. 258, 62 N. W. 1054; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960; *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321. True, it is the duty of the court in the trial of such a case as this, to instruct the jury as to every homicidal offense to which the evidence, in any reasonable view of it, can apply: *Hempton v. State*, 111 Wis. 127, 86 N. W. 596. But, just as true, it is its plain duty, if the evidence in any such view will not support a conviction of any other homicidal offense than murder in the first degree, to say so to the jury.

The court refused to grant the request of counsel for the accused to instruct the jury that: "It is your duty to scrutinize the evidence in this case with the utmost caution and care, bringing to that duty the reason ⁵²⁴ and prudence which you would exercise in the most important affairs of life, in fact all the judgment, caution and discrimination you possess, and then, unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt of the defendant's guilt, you should acquit the accused and render a verdict of not guilty."

The refusal of the court seems to have been based upon the ground that the idea intended to be conveyed by the request was embodied in the general charge by the following language: "The jury are by law made the sole and responsible judges of the evidence; it is their duty to determine the weight and effect of the evidence as a whole and, as necessary to such determination, to recall and weigh the testimony of each witness and judge his or her credibility as best they can in the light of the whole facts as disclosed by the evidence. . . . In the per-

formance of this duty, that of scrutinizing the evidence and determining its effect, you should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life. Having done this, if there then remains in your mind no reasonable doubt of defendant's guilt, you should convict him; otherwise you should acquit him."

Waiving for the moment the question of whether the requested instruction as a whole was a correct statement of the law, we will examine the counsel's contention. He concedes that the language used by the trial judge was a full equivalent for that requested save for the omission of the word "care." This court has not put its stamp of approval, nor has any other court, upon the precise language of the requested instruction, as to the use of that word, but has said repeatedly that the idea expressed in such instruction should be given to the jury, and if not given when requested the refusal constitutes reversible error. We are unable to see any substantial difference between the language of the court and ⁵²⁵ that which was requested. Perhaps it would be better to use the term "care and caution." If so, that would not constitute reversible error if the correct idea was in fact, in appropriate language, given to the jury. It would seem that when a jury is told that in examining the evidence they "should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life," there is nothing more that could be added. That seems to include the idea of utmost care and caution amplified so as to more clearly impress the idea upon the minds of the jury than would be done by the mere use of the term which counsel seems to think should have been used. In addition to the language last quoted, as will be noted, the jury were told that they should weigh the evidence of each witness "as best they can." There again, it would seem that they were told, in effect, that they should scrutinize the evidence with the utmost care and caution. On the whole we are unable to see any infirmity in the instruction along the line claimed by counsel for plaintiff in error. On the other hand, it would seem that the requested instruction is not a correct statement of the law. The concluding part of the request seems to be fatally ambiguous, to say the least. This is the language to which we refer: "Unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt

of the defendant's guilt, you should acquit the accused and render a verdict of not guilty."

That would commonly be understood as meaning that, unless the evidence creates a reasonable doubt in the minds of the jurors as to the defendant's guilt he is entitled to an acquittal; while of course the law is that unless the evidence fails to impress the minds of the jury beyond every reasonable doubt of the defendant's guilt he is entitled to an acquittal. ⁵²⁶ The language of the trial court's instruction on that subject was very plain and strictly accurate. He said: "If there then remains in your mind no reasonable doubt of the defendant's guilt, you should convict him; otherwise you should acquit him."

Error is assigned on the refusal to give this instruction: "The witness, Ole Gustad, according to his own statements, if they are true, was either an accomplice or an accessory after the fact. In such cases, courts advise the jury that, while they may convict on the uncorroborated testimony of such person, it is dangerous to do so and the evidence should be scanned with great care and caution, and so the court instructs you in this case."

It is sufficient, it seems, to justify the refusal of that instruction that it assumes that there was no evidence whatever in the case that the accused committed the offense other than that of Gustad. True, his was the only direct evidence on the question, but there was much circumstantial evidence pointing the same way, so that it was not proper to state to the jury that the state's case rested on the uncorroborated testimony of Gustad.

Further complaint is made that the court failed to instruct the jury in respect to the evidence tending to show that the character of the accused prior to the commission of the offense was inconsistent therewith. No request in writing was presented by counsel for the accused to be given by the court to the jury on the subject, so no proper foundation was laid for an exception to the failure of the court to instruct in respect to the matter. The rule is now firmly established that where the charge of the court does not cover all phases of the case counsel is bound to call its attention to the omission by an appropriate request or be precluded from making such failure available as reversible error: *United States Express Co. v. Jenkins*, 64 Wis. 542, 25 N. W. 549. That a mere verbal request made to the court for an instruction upon a particular subject is not an appropriate request within the meaning ⁵²⁷ of the decisions, cited, was pretty clearly held in *Karber v. Nellis*, 23

Wis. 215, where the language was used: "If counsel desire a specific instruction on any particular point, they should draw such instruction and ask the court to give it. A mere request to charge more particularly upon some point, does not present any question for review here."

In a very late case—*Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249, opinion by Mr. Justice Dodge—section 2853 of the Statutes of 1898 was construed as requiring requested instructions to be presented to the court in writing. It was said, in effect, that the section contemplates such a presentation of a request as a condition precedent to the duty of the court to consider it. The significant language of the statute which led to that construction is this: "Each instruction asked by counsel to be given to the jury shall be given without charge or modification the same as asked or refused in full."

It was held that such language plainly indicates that the legislative idea was that requests to charge must be made in writing, each proposition being stated in the exact language which it is desired the court shall use, and that the court shall rule upon the precise statement of the law thus presented. So it was held that specific error can be assigned "upon a refusal to instruct a jury" only when such refusal relates to "an instruction formally requested in writing."

After verdict a motion was made for a new trial upon the grounds heretofore discussed, and, among others, that Charles Vick, one of the trial jurors, contrary to his statement under oath upon his examination on the voir dire, prior to his having been called as a juror having formed and expressed an opinion that the accused was guilty. In support of such motion Richard Townsend testified that he was the proprietor of a barber-shop in Neillsville where the cause was tried; that Charles Vick, the juror, during the trial of Gustad and thereafter, visited his shop on two or more occasions ⁵²⁸ and there conversed as to both Gustad and Cupps and whether they were guilty or innocent; that on the first visit the trial of Gustad was about to be concluded; that Vick then said in conversation with, or in the immediate presence of, one Jackson, one of Townsend's employes, and in the hearing of Townsend, that he thought both Gustad and Cupps were guilty; that if he was on the jury he would so find. The witness said he was not then acquainted with Vick; that there were several persons in the shop, all the chairs being occupied; that during the trial of both Cupps and Gustad conversation in the shop was general in regard to the

cases; that Vick visited the shop some days after the Gustad trial was concluded and when that of Cupps was about to commence, when he expressed the opinion that he would not be on the case because he heard the Gustad trial; that he was drawn for that trial and stricken off; that after the verdict was rendered against Cupps Vick again visited the shop, when the witness heard him say that he served as one of the jurors thereon; that he told the attorneys when he was called that he heard the Gustad trial and expected they would strike him off but that they did not. The witness said, further, that on all the occasions mentioned he merely overheard the statements to which he testified; that he did not himself have any conversation with the juror. Jackson, being sworn as a witness, testified that on the first occasion he remembered of Vick visiting the shop, all he said about the Gustad case was that he had been excused therefrom. Jackson further said that he did not remember of hearing Vick at any time make the statements testified to by Townsend; that on the occasion of Vick's visiting the shop just before the Cupps trial he merely said he did not think he would be drawn, as he heard the evidence in the Gustad trial; that Vick visited the shop after the Cupps trial; but that he could not recall anything the juror then said in respect thereto. George J. Jaques testified to having heard Vick say after ⁵²⁹ the Cupps trial that he stated on his voir dire that he heard a portion of the testimony on the Gustad trial, or formed some opinion, or something of that sort, and was surprised that they left him on the jury. Robert J. Glass testified that just after Vick had been struck off the Gustad jury he heard the latter say in the barber-shop that he was glad of having been so struck off and that it was his opinion that both Gustad and Cupps should be punished. Vick testified that he did state in Townsend's shop that he had been struck off the Gustad jury, or that he heard part of the trial of Gustad; that he did not state prior to Cupps' trial in such shop or anywhere else, to anyone, that Gustad and Cupps were both guilty or that Cupps was guilty; that he did not hear the testimony in the Gustad Case; that he was excused after the jury was impaneled, and went home, coming back about as such trial was concluded; that he heard the arguments of counsel and so stated on his voir dire when called in the Cupps case; that he stated on one occasion that, whoever the guilty party was who killed the O'Dell woman, he should be punished, not stating whether in his opinion Cupps and Gustad or either of them did the deed. Upon that

testimony the court held that Vick did not make any false statements when examined upon his voir dire in the Cupps case, and had not prior thereto formed or expressed any opinion as to Cupps' guilt or innocence. There was evidence both ways on the question. That presented for determination a question of fact. The decision reached has all the conclusiveness upon this appeal of the determination of a trial court upon any issue of fact. That is, it cannot be disturbed unless it satisfactorily appears from the record to be against the clear preponderance of the evidence: *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629. Evidence to impeach a verdict by attacking the fairness of a jury in such circumstances as that attempted in this case, to be effective, should be very clear and satisfactory. The court should not act upon it favorably ⁵³⁰ to impeaching the verdict in the face of an unequivocal denial of the juror, in the absence of the most clear and satisfactory evidence of the falsity of such denial. After verdict, especially in a capital case, the interests at stake, tempting an attack upon some particular juror, are so great, the ease with which such statements as those claimed here, made in casual conversations, may be varied honestly or otherwise, and thus a prima facie case be presented where none exists in fact, that all such evidence should be scrutinized with the greatest caution and care before passing judgment favorably thereto. The evidence against juror Vick was substantially all as to mere casual conversations. His unequivocal denial was opposed only by the evidence of one witness. There was definite evidence of two distinct statements made by him, one heard by Townsend upon the last day of the Gustad trial, and one by Glass upon the day the jury therefor was impaneled. It seems quite clear that the occasion testified to by Townsend was not the one testified to by Glass. So in each instance there was the evidence of the juror against that of one person, such opposing person not being definitely corroborated by any circumstance whatever, while the juror had in his favor a strong presumption of innocence. The witness Jackson, who, according to Townsend, would be most likely to have remembered the statement made by Vick which Townsend testified to, if it were in fact made, stated that he could not recall having heard the latter make any such statement. The testimony that Vick said to Jaques and others that he heard the evidence upon the Gustad trial is quite effectually overborne by the circumstance that he was not present during the taking of the evidence. He denied hav-

ing stated, understandingly, that he heard the evidence but admitted being present during the argument to the jury. The effect of Jaques' testimony is that the juror claimed that the statements made in his presence or to him in respect to such juror's knowledge of the Gustad trial were substantially the ⁵³¹ same as he made upon the voir dire when called in the Cupps case, and there does not appear to be any definite evidence that such is not the case. It hardly needs argument to demonstrate that the finding of the trial court against the charge of unfairness as to juror Vick, upon such evidence cannot be disturbed. There is at least clear warrant for saying that such finding is not against the clear preponderance of the evidence. It seems that if such evidence would warrant granting a new trial because of the unfairness of a juror, there would be very little stability to verdicts in cases of great public and private interest, such as this.

Further complaint was made on the motion for a new trial, because one Cornelius, the register of deeds of Clark county, while on the way to his office passed the jurors on one occasion during the trial, in front of the courthouse, and that as he did so he said "good morning" and handed the officer in charge of them one dollar and twenty-five cents or one dollar and fifty cents, with a request that he should expend the same for cigars for their use, and that the officer acted accordingly. There was evidence that Cornelius was in no way interested in the case, and that the act was purely one of goodfellowship which had no baneful influence whatever upon the jury. True, it would be better if no such attentions to a jury, especially while engaged in such an important trial as this, should occur. However innocent the person giving them may be, they are highly improper, and the conduct of the officer consenting thereto or participating therein is highly reprehensible. However, the presumption or prejudice from the transgression in the circumstances of this case was such as to yield quite readily to rebutting proof; and it was most thoroughly rebutted, as it seems to us. The officer in charge of the jury frankly related all the circumstances connected with the transaction, showing that Cornelius made no effort to talk with the jury; that his conversation was wholly with such officer except that he said good morning to the jurors; that his handing the money to the ⁵³² officer to buy cigars for the jurors was a mere friendly act, such as he was accustomed to do, and that such officer asked the trial judge whether he should give the cigars to the jury or not. The circumstance as explained was of trifling char-

acter—certainly not one that would warrant disturbing the verdict of a jury under the rules laid down in the opinions of this court: *Hempton v. State*, 111 Wis. 127, 86 N. W. 596. The conduct of Cornelius and the officer presents none of the elements of gross misconduct sometimes severely criticised by appellate courts and sometimes held fatal to the verdict.

We have now considered one by one all the propositions presented by counsel for plaintiff in error, and endeavored to respond fully to his appeal for a careful, critical and thorough examination of the case to the end that if the accused has not had a fair trial he might be relieved from the judgment rendered against him. In our judgment there is no error in the record. The trial seems to have been exceptionally clean and fair from beginning to end, and the result must stand so far as judicial relief is concerned.

By the Court. The judgment is affirmed.

The plaintiff in error moved for a rehearing. The following opinion was filed February 23, 1904:

MARSHALL, J. A motion for reargument has received careful attention. Because of the importance of the case, and the evident confidence of counsel that a further consideration of one question, not very fully treated in the former opinion, should be had, we have examined the matter with care, and will depart from the usual custom of not filing a second opinion upon coming to the conclusion that the judgment entered should stand.

The question above referred to is this: Does the destruction of human life by an act of another naturally and according ⁵³³ to the ordinary course of things calculated to effect that result, in the absence of any explanatory circumstances to the contrary, raise a presumption of fact or of law that the destroyer intended such result and is guilty of murder in the first degree? Respecting counsel's argument in support of the negative, in the former opinion we said: "Counsel for plaintiff in error freely admits that the law is as thus stated as applied to murder at the common law, but insists that the law is different under our statutory system. No very good reason is advanced to support that idea, and no authority in support thereof is cited."

Counsel takes issue with that because he cited, before, *Stokes v. People*, 53 N. Y. 164, 179, 13 Am. Rep. 492. This seems to

be a fair, if not a sufficient answer thereto: The quoted language was not used without qualification or explanation. It was said that counsel produced no very good reason or authority for his position, since our statutes, as construed, make every intentional destruction of human life, not excusable or justifiable, murder in the first degree; and the departure from the common-law rule, as to the presumption arising from an unexplained homicide, where such departure prevails, grows out of statutory differences rendering such intentional killing a homicidal offense, either in the first or some lower degree according to the facts. *Stokes v. People*, 53 N. Y. 164, 179, 13 Am. Rep. 492, was not deemed important, since mere actual intent to kill was not, under the New York statutes when Stokes' offense was committed, in any circumstances, necessarily, murder in the first degree. We referred to one of many cases that might have been cited, showing that the rule contended for found a place in the books by reason of features of many statutes not in ours. Here, actual intent to slay satisfies the premeditated design of the statute (*Hogan v. State*, 36 Wis. 226; *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593), and is inconsistent with any other homicidal offense. That has been so distinctly and firmly entrenched in our jurisprudence that it was supposed ³³⁴ authorities to the contrary elsewhere, under different statutes, might properly be referred to as not in point. Counsel now cites quite a number of adjudications, not taking note of our suggestion that decisions under statutes radically different from ours cannot be followed, further than to say that some of such authorities are based on statutes like ours. Though decisions of the character cited exist in abundance, we venture to say that without any important exception the variance therein, from the doctrine that the unexplained taking of human life by means ordinarily and naturally calculated to produce that result implies a homicide committed with actual intent, satisfying the element of premeditated design of our statute, is attributable, reasonably or necessarily—the latter in most cases—to plain statutory differences. To refer in detail to the decisions at hand illustrating that, in connection with the statutes involved, would take much time and space. We will refer to a goodly number of them, however, pointing out the significant features of such statutes.

The first statutory system for punishing criminal homicide in this country was adopted in Pennsylvania in 1794: 1 *Pepper & Lewis' Dig. of Laws*, 1274. "Willful. deliberate and premeditated murder, and murder committed in the perpetration or attempt to perpetrate" certain other specified offenses, were made

murder in the first degree, and all other, murder in the second degree. It was early construed as rendering mere intent to kill not inconsistent with murder in the second degree, and as requiring, in order to raise the grade necessarily to the higher degree, the independent elements of deliberation and premeditation upon the execution of the intent, the element of intent being referable only to willfulness: *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414; *Small v. Commonwealth*, 91 Pa. St. 304; *Commonwealth v. Drum*, 58 Pa. St. 9. The latter case will be found cited very often. It is to this effect: Mere felonious intent to kill is not sufficient to constitute ⁵³⁵ murder in the first degree, not having the element of fully formed design, involving premeditation and deliberation. It may be murder in the second degree, but to raise it to that phase of murder in the first degree requiring the element or actual intent to kill there must be willfulness, signifying intent, and the other elements in addition; hence the mere unexplained destruction of human life raises only the presumption of murder in the second degree. That gives full effect to the universal rule that every sane person is presumed to intend the natural and probable results of his acts. Such effect being death, the intent to produce death is presumed, but not that the act producing it was characterized by the other elements mentioned. Virginia, West Virginia, Tennessee, Missouri, Michigan, Nevada, Colorado, Nebraska, California, North Carolina, Texas, Iowa, Washington, North Dakota, Massachusetts, Montana, Maine, New Jersey, New Hampshire, and many other states, including by far the greater part of the states of this Union, have similar statutes. They are all based in the Pennsylvania model. Many decisions under them, and text-book authorities, might be referred to supporting the idea that the presumption under consideration does not necessarily go higher than murder in the second degree; but a careful examination of the cases will show a uniform distinction made therein between mere intent to kill before the fatal act, and that full intent required by the statute, the term "deliberate" being used in addition to the term "premeditated design." The usual language is: "When perpetrated from a deliberate and premeditated design," etc. For examples we refer to *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *State v. Carver*, 22 Or. 602, 30 Pac. 315; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Floyd v. State*, 50 Tenn. 342; *People v. Wolf*, 95 Mich. 625, 55 N. W. 357; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *McCue v. Commonwealth*, 78 Pa. St. 185, 21 Am. Rep. 7; *Commonwealth v. Drum*, 58 Pa. St. 9; *Dukes v. State*, 14 Fla. 499;

State v. Payne, 10 Wash. 545, 39 Pac. ³³⁶ 157; State v. Foster, 61 Mo. 549; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380; State v. McCormick, 27 Iowa, 402; Schlencker v. State, 9 Neb. 300, 2 N. W. 710; Simpson v. State, 56 Ark. 8, 19 S. W. 99; Williams v. State, 83 Ala. 16, 3 South. 616; Hill v. Commonwealth, 2 Gratt. (Va.) 594; Howell v. Commonwealth, 26 Gratt. 995. The law as declared therein is laid down without proper or any notice of exceptions in the following works: Desty's Criminal Law, sec. 129g; 21 Am. & Eng. Ency. of Law, 2d ed., 163; 2 Thompson on Trials, sec. 2208; 1 Wharton's Criminal Law, sec. 392; 1 McClain's Criminal Law, sec. 355. The following examples of what is in effect said in such decisions will clearly indicate the significance of the statutory feature we have referred to.

Where an intention to kill exists, it is willful; whilst intention is of the essence of the offense, something more is required for murder in the first degree. There must be circumstances warranting the jury in finding deliberation and premeditation. The unexplained destruction of human life raises the presumption of intent to kill, but that only points to murder in the second degree, because the other constituent elements of willful killing essential to murder in the first degree, deliberation and premeditation, do not arise by presumption: State v. Foster, 61 Mo. 549. The similarity of this to the views expressed in Commonwealth v. Drum, 58 Pa. St. 9, will be noted.

Mere unjustifiable, inexcusable intention to kill is not enough to constitute felonious homicide above murder in the second degree. The higher degree requires premeditated intent, which does not arise from unexplained destruction of human life: Simpson v. State, 56 Ark. 8, 19 S. W. 99. The cases are all to the same general effect.

A statutory system was adopted in New York in 1829. Felonious homicides were by it divided into murder and manslaughter. Murder was divided into three distinct classes as to circumstances, but they were all subclasses of the one ⁵³⁷ offense of murder, no degrees being established. This state antedated New York in that regard by thirteen years. The original New York statute is as follows: "The killing of a human being, without authority of law, . . . in any . . . manner, unless . . . manslaughter or excusable or justifiable homicide, shall be murder in the following cases: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being; 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of

human life, although without any premeditated design to effect the death of any particular individual; 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony": 2 N. Y. Rev. Stats. 1829, 1st ed., pt. 4, c. 1, tit. 1, p. 656, secs. 4, 5.

By chapter 197 of the Laws of New York of 1862 the offense of murder was divided into three degrees, corresponding to the existing classes of murder. By chapter 644 of the Laws of 1873, a further change was made, the statute assuming this form as to homicide in the first degree: "When perpetrated from a deliberate and premeditated design to effect the death of the person killed or of any human being; or when perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or when perpetrated without any design to effect death by a person engaged in the commission of any felony."

And as to the second degree it took this form: "Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide . . . shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation": 3 N. Y. Rev. Stats. 1875, 6th ed., pt. 4, c. 1, tit. 1, p. 428, sec. 5.

As first adopted the system was said to make all felonious homicide characterized by intent to take human life. murder. ⁵³⁸ but as neither making such intent essential to nor excluding it from the second phase of the offense: *People v. Austin*, 1 Park. Cr. Rep. 166; *People v. Clark*, 7 N. Y. 385; particularly *Darry v. People*, 10 N. Y. 120. After the first change, *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492, was decided, and, consistent with the rule established as to murder in the second degree, the language was used upon which counsel relies. The court leaned toward the holdings under the Pennsylvania statute. After the second change adding the element of deliberation to that of premeditated design in murder in the first degree, and the element of intent to kill, but without premeditation and deliberation, to murder in the second degree, the doctrine that circumstances raising the presumption of intent to kill satisfy only the calls for the essentials of the latter degree necessarily prevailed: *People v. Beckwith*, 103 N. Y. 360, 8 N. E. 662; *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371; *People v. Conroy*, 97 N. Y. 62.

The state of Florida adopted the New York system as it existed after the change of 1862, with its judicial construction of the language of murder in the second degree. That explains why *Dukes v. State*, 14 Fla. 499, now cited by counsel, does not have the force counsel claims for it.

The Minnesota system, as it existed up to its revision of 1878, was copied from ours, with some changes which we will mention. Actual intent to kill, coupled with heat of passion, was made an element in one degree of manslaughter. The language as to murder in the first degree was a verbatim copy of ours. That of the second degree differed from ours in this: For the words here, "dangerous to others . . . although without any premeditated design to effect the death of any particular individual" (Rev. Stats. 1849, c. 133, p. 682, sec. 2; Rev. Stats. 1858, c. 164, p. 928), were these words: "Dangerous to one or more persons . . . without any design to effect death." That was changed before the Minnesota revision of 1891 by making the second degree the ⁵³⁹ third and making killing with design to effect the death of the person killed or of any other, but without deliberation and premeditation murder in the second degree: Minn. Crim. Code 1866 (Rev. 1866), c. 94, p. 597, sec. 2; 2 Minn. Gen. Stats. 1891, p. 488. Before the change referred to the court said, respecting the presumption under consideration: "It is presumed that every sane person intends the ordinary and natural consequences of his own deliberate act, and that every voluntary act springs from deliberate volition, and not blind passion; and as every act unlawful in itself is presumed to have been wrongfully intended till the contrary appears, it follows that such a killing, unaccompanied by any circumstances of extenuation or explanation, necessarily raises the presumption that it was intentionally and maliciously done; and unless it appears that such intention was formed and executed under the influence of 'a heat of passion produced by a sudden provocation, or in sudden combat,' it is equivalent in import and meaning to a premeditated design, as that phrase is used in the statutes": *State v. Lautenschlager*, 22 Minn. 514.

After the change that was adhered to because the essentials of murder in the first degree were as before, the views of the court being expressed thus: "The offense may be found to be of this grade (murder in the first degree) from the mere fact and circumstances of the killing, and where there are no circumstances to prevent or rebut the presumption the law will presume that the unlawful act was intentional and malicious, and

was prompted and determined on by the ordinary and natural operations of the mind": *State v. Brown*, 41 Minn. 319, 43 N. W. 69.

That was affirmed in *State v. Lentz*, 45 Minn. 177, 47 N. W. 720, in this language: "Murder in the first degree may be proved by the mere fact of an intentional killing. . . . The evidence contained no suggestion of any provocation or mitigating circumstances, or that the killing was accidental, the testimony ⁵⁴⁰ of the defendant himself excluding any such hypotheses. The killing, if committed by defendant, was murder in the first degree."

This court rejected the New York construction of the language of our murder in the second degree in *Darry v. People*, 10 N. Y. 120, holding that the legislative plan here was to make every inexcusable, unjustifiable homicide, intentionally effected, murder in the first degree, to make the element of intent to kill an essential of that and to exclude it from all other degrees of felonious homicide; and to that end that the terms "design" and "premeditated design" were used synonymously and as meaning only actual intent: *Hogan v. State*, 36 Wis. 226. The court was free to and did place its own construction on the statute, the language thereof not having received construction in New York before its adoption here, further than to the effect that every homicidal offense characterized by intent to kill is murder, not manslaughter, which was adopted. That is, as seems plain, in harmony with constructions of statutes elsewhere, except in the instance referred to, and such as are explained by radical difference in language. At this time there is no conflict between this court and that of New York, because the statute there has been changed, as we have seen, to make the literal sense thereof conform to the judicial construction; and our statute has been likewise changed. The revisers of 1875 changed the language of murder in the second degree, "without any premeditated design to effect the death of the person killed or of any particular individual," to "without any premeditated design to effect the death of the person killed or of any human being." That change was made to make the statute conform in literal sense to *Hogan v. State*, 36 Wis. 226: See Revisers' Notes, 1878, p. 297.

From the foregoing it follows that all the decisions and remarks of text-writers to the general effect that the pre-

sumption under discussion points only to murder in the second ⁵⁴¹ degree, instead of supporting the idea that it should be so restricted under our statutes, conclusively indicates to the contrary, since the element of intent to kill here is consistent only with murder in the first degree, and such element being present no additional element of deliberation is necessary, all the deliberation essential being involved in the actual formation of the purpose to kill before the perpetration of the fatal act. The formed design or intent of our premeditated design need not exist any appreciable time or time sufficient for the intervention of any independent element between it and the fatal act, it being sufficient if it actually precedes such act. Intent to kill means just what the ordinary signification of the words suggest. Whether it be described by the words "actual intent," "design," or "premeditated design," makes no difference. When we have entirely out of view those subtleties often indulged in in discoursing on the meaning of "premeditated design," or "deliberate and premeditated design," and give to the words only the meaning ordinarily attributed to them in the common use thereof, a person who effects the death of another by design does so intentionally and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated, or thought of, because without mental action the purpose could not be formed. So when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design and by premeditated design. That the word "premeditated," as used in our statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design," where used inclusively in murder in the first degree, as to "design" where that word alone is used exclusively in murder in the third degree and manslaughter in the first, ⁵⁴² second and third degrees. We should say in passing that this is only repeating the reasoning found in *Hogan v. State*, 36 Wis. 226, to render as clear as we can the reason why circumstances, from which, unexplained, arises the presumption of intent to destroy human life, may, and in case they are such as naturally and in the ordinary course of things would be ex-

pected to produce that result, necessarily must, point to the offense of murder in the first degree, and that only.

No uncertainty as to the matter here discussed would probably at any time have existed here after the decision in *Hogan v. State*, 36 Wis. 226, had the reasoning there been followed without interruption. It was somewhat lost sight of in *Clifford v. State*, 58 Wis. 477, 17 N. W. 304, language being there used indicating that actual intent to kill is one thing, and premeditated design to kill another. The reasoning is along the lines of decisions under statutes having the several elements of willfulness, deliberation and premeditation. It went beyond many of them in that it indicated that the element of lying in wait, of deliberation upon the execution of the intent, is essential. Whereas, in *Hogan v. State*, 36 Wis. 226, it was said: "The premeditated design of our murder in the first degree is simply an intent to kill. Design means intent, and both words essentially imply premeditation. The premeditation of the statute does not exclude sudden intent."

In the *Clifford* case it was said: "Intentional and premeditated design are very far apart."

The general treatment of the subject in the opinion led to the mistake in *Terrill v. State*, 95 Wis. 276, 70 N. W. 356, and *Sullivan v. State*, 100 Wis. 283, 75 N. W. 956. In the former the reasoning of Mr. Justice Orton was adopted and that of Ryan, C. J., in the *Hogan* case, was criticised. The error became clearly apparent when *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593, was decided, the rule of the *Hogan* case being re-established. That was reviewed and approved ⁵⁴⁸ in *Miller v. State*, 106 Wis. 156, 81 N. W. 1020. Thus, the idea that the premeditated design of the statute includes necessarily any element of deliberating upon the execution of the intent was emphatically repudiated.

Had the text-writers comprehended better the exceptions to statutes in general, this language in 1 McClain's Criminal Law, section 359, would not have been written without noting and giving significance to such exceptions: "It has been said in some cases that an intentional killing, the intent to kill being shown by the use of a deadly weapon, will, in the absence of any evidence of justification, excuse, or mitigation, be murder in the first degree. Such a presumption is denied, however, in other cases, and it is said that killing with a deadly weapon is not enough alone to show deliberation and premeditation. . . . However, according to the great weight of authority

such presumption does not arise from proof of intentional killing alone, and from such evidence, without more, the jury would not be justified in convicting of the first degree."

The conflict of authority referred to appears only when one does not appreciate the fact that statutory differences correspond to differences in the adjudications. Strange it seems that the author did not take up the various statutes, classify them, as may easily be done, and show how it came about that in many and most jurisdictions the presumption under discussion has been held to go only to murder in the second degree, while in a few jurisdictions, including our own and that of Minnesota, it is held to go to murder in the first degree. Bishop, in his new Criminal Procedure, volume 2, section 602, recognizes the wide difference in the statutes to which we have referred, this language being used: "If the deadly weapon is used in a way to take life, the not-conclusive presumption is that the party meant this result; so that the first degree of the offense is, under most of our statutes, shown. But a mere killing with such weapon, with nothing more, is not murder in the first degree. And where the statute requires a more distinct premeditation, or ⁵⁴⁴ more intense malice, the verdict can be only for the second degree. But it should be borne in mind that the circumstances and statutes differ, and that the jury should pass on the question."

No case is referred to by the author, except those under statutes differing from ours, requiring something more in murder in the first degree than mere intent to kill, yet he concludes that a presumption of fact arising from the unexplained use of a deadly weapon in a way ordinarily calculated to produce death, and which does produce it, arises, of such strength to warrant a jury, if they see fit, in finding murder in the first degree. That is really as far as it was necessary to go in this case, and as far as the court in fact went; though it seems that, since under our statute actual intent to kill, executed, without any other element, there being no circumstance reducing the offense below that of the highest, constitutes murder in the first degree, the presumption of law, that every person intends the natural and ordinary consequences of his voluntary acts, must, when the act causes the death of a human being, include the presumption that the perpetrator thereof intended that result and is guilty of murder in the first degree, casting upon him the burden of producing evidence to at least involve the truth of the

matter in reasonable doubt. This court said in the Clifford case, where a conviction was had of murder in the first degree, that the expression in the trial court's instructions, "It is presumed that a reasonable person intends all the natural, probable and usual consequences of his act," is strictly correct in all moral action or human affairs, and is an axiom of the law; and that the expression, "If a reasonable man uses a deadly weapon and life is taken, he is presumed to intend the natural consequences of his act and would be guilty of murder—is but an application of the principle of homicide with a dangerous weapon likely to kill." "If a weapon likely to kill, and which did kill, was used, the intent ⁵⁴⁵ is presumed that such a natural and reasonable consequence would follow the assault, and nothing less." True, in connection with that, language was used of the character heretofore referred to, but, as we have seen, so far as it suggested that there may be an intent, a mental purpose to take human life, in some other homicidal offense than the first, such idea has been repudiated. What was said in respect to the presumption under discussion, therefore, stands as an authoritative declaration to the same effect as that contained in the opinion in this case, which counsel thinks is prejudicially wrong to plaintiff in error.

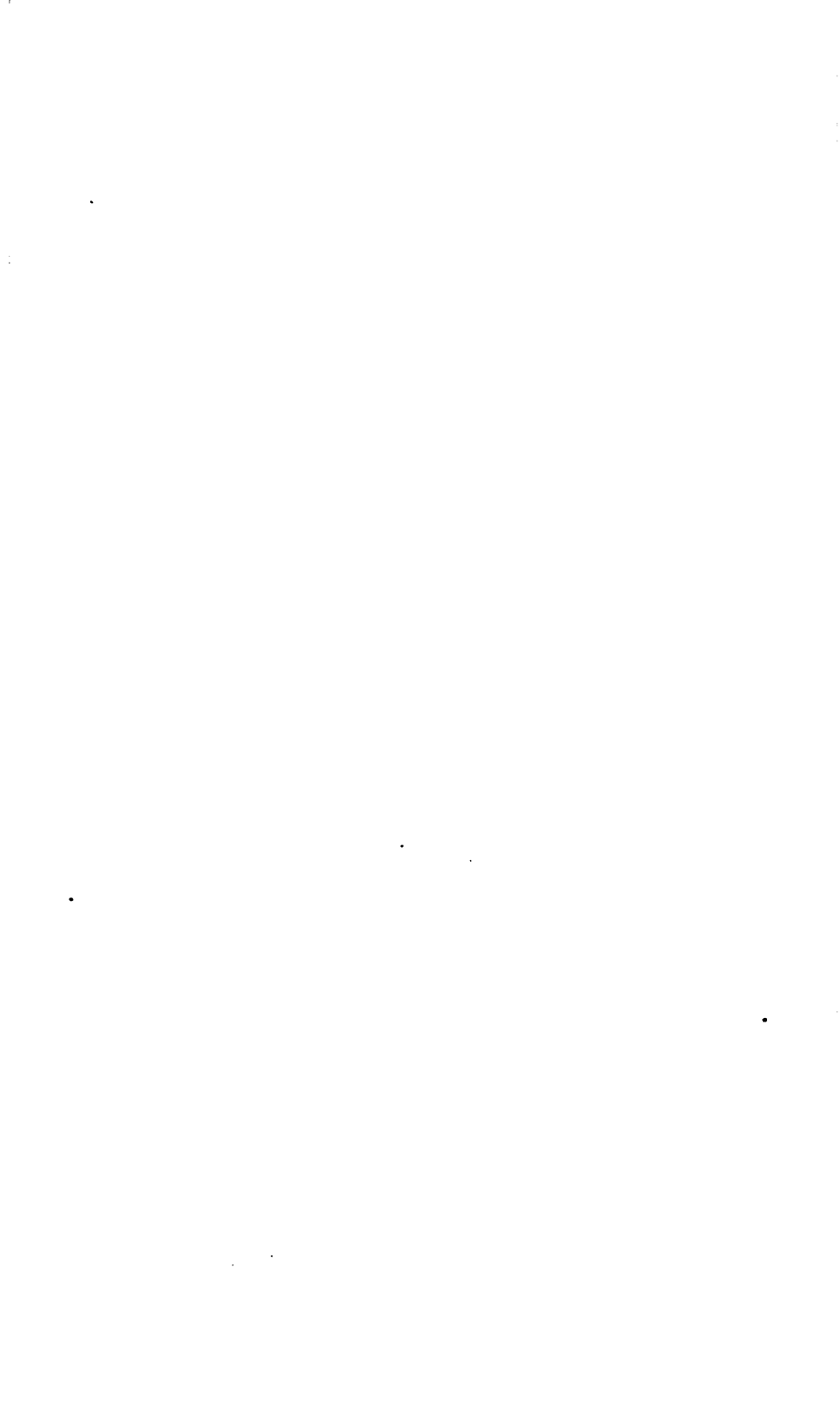
The result of a full response to counsel's appeal for a reconsideration of the question above discussed is that the conclusion in respect thereto, embodied in the judgment rendered, is correct. Therefore the motion for a rehearing must be denied.

By the Court. So ordered.

To Constitute a Homicide Murder in the first degree, there must be a specific intent to kill formed in the mind of the slayer before the killing is done, though it is not necessary that such intent be conceived for any particular length of time: *King v. State*, 68 Ark. 572, 82 Am. St. Rep. 307. The killing may follow instantly the formation of the intention: *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865; *State v. Foster*, 130 N. C. 666, 89 Am. St. Rep. 876. See, too, *Jolly v. Commonwealth*, 110 Ky. 490, 96 Am. St. Rep. 429. Murder in the first degree may be committed by maliciously firing a gun into a crowd, without regard to the consequences: *State v. Young*, 50 W. Va. 96, 88 Am. St. Rep. 846; or by striking the victim with a baseball bat: *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324; or by throwing a rock: *State v. Foster*, 130 N. C. 666, 89 Am. St. Rep. 876. In a murder trial, it is proper to instruct the jury that a man is presumed to intend the natural consequence of his acts: *State v. John*, 172 Mo. 220, 95 Am. St. Rep. 513, where it is held that murder may be committed by a blow with the fist.

The Intention to Commit an Offense is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act: *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488. Malice may be implied from the use of an instrument known to be liable to produce death: *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22; *State v. Norwood*, 115 N. C. 789, 44 Am. St. Rep. 498; *State v. Jackson*, 36 S. C. 487, 31 Am. St. Rep. 890. As to the applicability of this rule where murder in the first degree is charged, see *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81; *State v. Deschamps*, 42 La. Ann. 567, 21 Am. St. Rep. 392. According to *Honeycutt v. State*, 42 Tex. Cr. Rep. 129, 96 Am. St. Rep. 797, in order to constitute murder in the first degree, express malice must be affirmatively shown. Where one attacks another with a deadly weapon, the law presumes that he intends the natural consequences of his act: *State v. Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598.

Proof of a Motive for a Murder is not indispensable to a conviction: *Green v. State*, 38 Ark. 304; *Powell v. State*, 67 Miss. 119, 6 South. 646; *State v. David*, 131 Mo. 380, 33 S. W. 28; *People v. Cornetti*, 92 N. Y. 85; *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. Rep. 410, 38 L. ed. 208.



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4. **BILLS AND NOTES**—Estoppel to Deny Consideration—Parent and Child.—If a father, without consideration, executes a note to his child, he is not estopped to deny liability thereon by the fact that the child has contracted a debt for board, relying on the note to pay therefor, if it does not appear whether such debt was contracted before or after the suit was brought. (Tenn.) *Shugart v. Shugart*, 777.

5. **BILLS AND NOTES**—Consideration.—Funds belonging to a deceased wife deposited in bank belong, upon her death, to her husband, and notes for the amount of such funds voluntarily executed by him to his children, based upon love and affection, are without consideration and unenforceable. (Tenn.) *Shugart v. Shugart*, 777.

6. **BILLS AND NOTES**—Consideration—Parent and Child.—Services rendered by a daughter to her mother, such as she is morally bound to render, do not constitute a valuable consideration for a note executed by her father to her, in the absence of an express promise to pay for such services. (Tenn.) *Shugart v. Shugart*, 777.

7. **BILLS AND NOTES**—Conditional Delivery—Evidence.—It may be shown by parol evidence that a note, unconditional in terms, was conditionally delivered, and placed in the hands of the payee with the distinct understanding that it was not to be operative, or become a binding obligation, until the happening of some event. (Mich.) *Central Sav. Bank v. O'Connor*, 433.

8. BILLS AND NOTES—Conditional Delivery—Evidence.—If a note for a certain amount, payable at a certain time, is delivered to the payee, to take effect presently as the obligation of the maker, parol evidence is not admissible to introduce conditions or modifications of its terms. (Mich.) *Central Sav. Bank v. O'Connor*, 433.

9. BILLS AND NOTES—Conditional Delivery—Evidence to Avoid.—If a note is unconditional in its terms and delivered to the payee to take effect presently, evidence is not admissible to show a parol agreement that the note was to become void upon the happening of a certain contingency. (Mich.) *Central Sav. Bank v. O'Connor*, 433.

Protest.

10. BILLS AND NOTES—Noting of Protest.—The words, "protested for nonpayment," indorsed by a notary on a bill of exchange, together with the day of the month and year and the signature of such notary, are a sufficient noting of protest. (Ky.) *Moreland v. Citizens' Nat. Bank*, 293.

11. BILLS AND NOTES—Noting of Protest.—If a bill of exchange has been protested for nonpayment and notice has been given to the drawer and indorser, the noting of protest having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser is fixed, and the destruction of the paper upon which the noting of protest was done, whether it was purposely or accidentally, does not invalidate the protest. (Ky.) *Moreland v. Citizens' Nat. Bank*, 293.

12. BILLS AND NOTES—Insolvency—Notice of Protest.—If between the drawing and maturity of a bill of exchange the accommodation drawer makes an assignment for the benefit of creditors, notice of protest of the bill to him alone is sufficient. (Ky.) *Moreland v. Citizens' Nat. Bank*, 293.

See Corporations, 5, 10; Gifts.

BOARDS OF HEALTH.

See Health.

BOUNDARIES.

1. BOUNDARIES—Equity Jurisdiction.—If a person is in possession of land, claiming as owner, with the line surveyed as the original line recognized and acquiesced in as the true line by his adjoining owner for more than twenty years, such adjoining owner may be enjoined from moving the boundary fence upon the premises. (Mich.) *Wolf Brick Co. v. Lonyo*, 412.

2. BOUNDARIES—Equity Jurisdiction.—If a bill in equity filed to enjoin the defendant from moving a boundary fence upon premises occupied by complainant, under claim of title for more than twenty years, alleges that defendant disputes complainant's title, defendant, by answering without demurring, voluntarily submits the question of the title to the court, and cannot deny its jurisdiction to determine it. (Mich.) *Wolf Brick Co. v. Lonyo*, 412.

3. BOUNDARY FENCES—Acquiescence.—If a fence has been recognized by adjoining owners of land as on the true line for more than twenty years, either party is estopped to deny that it is on the true line whether it was originally established on the true line or not. (Mich.) *Wolf Brick Co. v. Lonyo*, 412.

Note.

Boundaries, agreements establishing, whether within the statute of frauds, 246.

BOYCOTTING.

See Conspiracy.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING ASSOCIATIONS—Insolvency—Rights of Withdrawing Members.—A withdrawing member of a building association, which is in fact insolvent at the time of the notice of withdrawal, though no steps have been taken to wind up its affairs, is not a creditor of the association, and is only entitled to share pro rata with the other stockholders of the association, although he has compromised his claim with the association and has taken its notes therefor for less than would be the withdrawal value of his stock if the association were solvent. (Va.) *Colin v. Wellford*, 859.

2. BUILDING ASSOCIATIONS—Insolvency Rights of Members—Withdrawal.—If insolvency of a building association exists as a fact, the right of the shareholders to equality in the distribution of the assets of the association attaches as paramount, and cannot be defeated by a notice of withdrawal upon the part of a member, nor by any dealing between him and the officers of the association which falls short of actual payment. (Va.) *Colin v. Wellford*, 859.

BUILDING CONTRACT.

See Contracts, 4-9.

Note.

Canals, eminent domain, exercising power of in behalf of, 830, 834.

CANCELLATION OF INSTRUMENTS.

EQUITY—Cancellation of Fraudulent Notes.—If promissory notes are obtained by a railroad company from the inhabitants of a city on the fraudulent representation that unless the notes are given the road will not be built to the city, but to a rival town, equity will decree their surrender and cancellation. (Miss.) *Crawford v. Mobile etc. R. R. Co.*, 476.

CARRIERS.

Passengers and Tickets.

1. CARRIER—Mutilated Ticket.—A Railroad Ticket is not mutilated, within the meaning of a stipulation that it shall not be good if mutilated, when no essential part has been removed, as where it is torn in two parts which so fit together as to form an entire ticket and make it indisputable that they are parts of the same ticket when presented in good faith to the conductor. (Ga.) *Young v. Central of Georgia Ry. Co.*, 68.

2. CARRIER—Construction of Ticket.—A Stipulation in a special contract embodied in a railroad ticket should be construed most strongly against the carrier. (Ga.) *Young v. Central of Georgia Ry. Co.*, 68.

3. CARRIER—Expulsion of Passenger on Wrong Train.—If a railroad company has two routes to the destination of a passenger,

and his ticket does not disclose which should be taken, the statements of the ticket agent and of a conductor that the passenger is on the right train are admissible in an action for her expulsion because on the wrong train. (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

4. **CARRIER.—A Passenger is not Bound by a Rule of the carrier, of which she has no knowledge, that passengers must go by direct route.** (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

5. **CARRIER—Passenger on Wrong Train—Explanation.—**It is the duty of a conductor about to expel a passenger because on the wrong train to listen to her reasonable explanation for being there. (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

6. **CARRIER—Expulsion of Passenger on Wrong Train.—**If there are two routes to the destination of a passenger, and a conductor expels her for taking the wrong train, when she explains to him that the ticket agent and a previous conductor assured her that she has taken the right route and train, and her ticket discloses nothing to the contrary, the railroad company is liable in exemplary damages. (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

7. **CARRIER—Expulsion from Train—Exemplary Damages.—**If a woman is expelled from a train in the night, notwithstanding her reasonable explanation, on the ground that she has taken the wrong route, it is none the less a willful wrong, entitling her to exemplary damages, because the conductor acts in a gentlemanly manner. (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

8. **CARRIER—Assisting Passenger in Right Car.—**If a woman takes the wrong car of a train by direction of the ticket agent, it is not the duty of the conductor to place her in the right car, where he gives her proper information, the train is vestibuled, and she is not so sick as to require assistance. (Miss.) *Illinois Cent. R. R. Co. v. Harper*, 469.

9. **CARRIER must Stop to Allow Passenger to Alight.—**If a railway company accepts fare to a particular station, it is bound to stop the train there to allow the passenger to alight; to slacken the speed is not sufficient. (Ga.) *Southern Ry. Co. v. Bandy*, 112.

10. **CARRIER—Passenger Alighting from Moving Train.—**If a passenger, under the direction of the conductor, gets off a slowly moving train, the railway company is liable for consequent injuries. (Ga.) *Southern Ry. Co. v. Bandy*, 112.

11. **CARRIER.—A Passenger cannot Rely on the Conductor's Instructions to do an act obviously dangerous.** (Ga.) *Southern Ry. Co. v. Bandy*, 112.

12. **NEGLIGENCE, CONTRIBUTORY.—Passengers on Vestibule Trains,** the vestibule doors of which are open, are not guilty of contributory negligence in passing from one car to another, unless they either know, or should know, that such vestibule doors are open. (Mich.) *Robinson v. United States Ben. Soc.*, 436.

Baggage.

13. **CARRIERS—Liability for Baggage.—**Under a statute providing that every carrier shall check every parcel of baggage taken by it for transportation, it is liable only for what the passenger takes with him for his own personal use and convenience. (Ky.) *Illinois Cent. Ry. Co. v. Matthews*, 316.

14. **CARRIERS—Loss of Baggage—Ownership.—**If a passenger is not the owner of goods checked by him as baggage, but is liable to the real owner for loss or damage to them, he is entitled to be

treated as their owner for the purpose of an action against the carrier for their loss or damage while in its hands. (Ky.) *Illinois Cent. Ry. Co. v. Matthews*, 316.

15. **CARRIERS—Merchandise as Baggage.**—If a carrier accepts a package or trunk of merchandise for transportation as baggage, with knowledge of its contents, it is liable therefor as for baggage. (Ky.) *Illinois Cent. Ry. Co. v. Matthews*, 316.

16. **CARRIERS—Paying Overweight Charges on Trunks as Baggage** is not of itself such notice to the carrier that the trunks contain merchandise, or articles other than ordinary baggage, as to render the carrier liable as for baggage. (Ky.) *Illinois Cent. Ry. Co. v. Matthews*, 316.

See Railroads; Street Railroads.

CERTIFICATE OF DEPOSIT.

See Gifts, 3; Lost Instruments.

CLOUD ON TITLE.

See Quietin~~g~~ Title.

COLLATERAL SECURITY.

See Pledges.

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See Sales, 1.

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CONDITIONS SUBSEQUENT.

See Railroads, 1, 2.

CONFLICT OF LAWS.

1. **CONFLICT OF LAWS—Negligence.**—Cases to recover for personal injury caused by negligence are governed by the law of the place of the injury, provided such law is not opposed to the public policy of the state where the action is brought. (Mich.) *Rick v. Saginaw Bay Towing Co.*, 422.

2. **CONFLICT OF LAWS—Comity—Public Policy.**—Before a court of any state is justified in refusing to enforce a right of action accruing under the laws of any other state or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interests of the citizens of the state of the forum, and it does not follow that because the statute differs from the law of the forum, it is contrary to the public policy of the state. (Mich.) *Rick v. Saginaw Bay Towing Co.*, 422.

CONSIDERATION.

See Bills and Notes, 3-6.

CONSPIRACY.

1. **CONSPIRACY, When Unlawful.**—The unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. (Mass.) *Martell v. White*, 341.

2. **TRADE, Restraint of—Unlawful Conspiracy to Prevent Competition.**—An association of granite manufacturers which imposes upon any of its members a fine for dealing with a person not a member of the association, where the fine is so large as to amount to moral intimidation or coercion, acts for an unlawful purpose, and if its action results in injury to the trade or business of another, its members may be answerable to him in an action of tort for their wrongful conspiracy. (Mass.) *Martell v. White*, 341.

CONSTITUTIONAL LAW.*Constitutionality of Statutes.*

1. **CONSTITUTIONAL LAW—Sales in Bulk.**—A statute providing that a sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular prosecution of the seller's business shall be fraudulent and void as against all creditors, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller under oath to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list of the proposed sale and of the price included and the conditions thereof, but exempting from its provisions sales by

administrators, executors, receivers, assignees for the benefit of creditors, trustees in bankruptcy and public officers acting under judicial process, is a constitutional exercise of the police power of the state. (Mass.) *Squire & Co. v. Tellier*, 322.

2. CONSTITUTIONAL LAW—Administration on Estate of Living Person.—A statute providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead, or has been secreted, confined, or otherwise unlawfully done away with," is void as depriving a person of his property without notice and due process of law, when applied to the property of a living person. (N. Dak.) *Clapp v. Houg*, 589.

3. CONSTITUTIONAL LAW—Statutes Relating to the Desecration of the Flag, Purporting to Have a Retroactive Operation.—A statute providing that any person who shall sell, expose for sale, give away or have in possession for sale, or to give away, or for use for any purpose, any article or substance upon which shall have been printed, painted, attached, or otherwise placed a representation of any flag, standard or ensign of the United States or state flag of the state, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which it is so placed, shall be deemed guilty of a misdemeanor, is unconstitutional. (N. Y.) *People v. Van De Carr*, 516.

Special Session of Legislature.

4. CONSTITUTIONAL LAW—Special Legislative Sessions.—If the state constitution empowers the governor to call extra sessions of the legislature and defines his duty respecting them, but does not authorize him to restrict or prohibit legislative action at such sessions by proclamation or otherwise, the legislature, under a call for an extra session for a particular purpose, is not restricted to passing laws for such purpose, but may legally pass other laws not germane thereto. (Wash.) *State v. Fair*, 897.

Amendments to Constitution.

5. CONSTITUTIONAL AMENDMENTS—Ratification—Presumption.—After ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state constitution. (Colo.) *People v. Sours*, 34.

6. CONSTITUTIONAL AMENDMENTS—Passage by Legislature.—If a proposed constitutional amendment is introduced in the Senate, amended without material change, entered in full upon the journal, and passed as amended, then transmitted to the House and without further amendment passed by the House as received from the Senate, enrolled and signed by the presiding officers of both Houses and published in the session laws as thus passed, but entered in full by mistake and clerical error upon the House journal as originally introduced in the Senate without the amendment, it is validly passed and enacted within a constitutional provision requiring proposed constitutional amendments to be entered in full upon the journal of each House, and is not void because of the difference in the journal entries of the two Houses. (Colo.) *People v. Sours*, 34.

7. CONSTITUTIONAL AMENDMENTS—Consolidation of City and County.—A constitutional amendment consolidating a city and county government into one and authorizing the people to adopt a charter for their government and to amend such charter and to provide for the election or appointment of municipal officers is not invalid as exempting a portion of the state from the provisions of the

constitution and general laws, nor is it repugnant to the constitution of the United States. (Colo.) *People v. Sours*, 34.

8. CONSTITUTIONAL AMENDMENTS—Future Contingencies. A constitutional amendment consolidating a city and county government, and authorizing the people to make and thereafter amend a charter for their government, is not invalid as being dependent upon future contingencies. (Colo.) *People v. Sours*, 34.

9. CONSTITUTIONAL AMENDMENTS.—If a state constitution authorizes amendments, the article providing for such amendments may itself be amended. (Colo.) *People v. Sours*, 34.

10. CONSTITUTIONAL AMENDMENTS.—Unless Satisfied Beyond Reasonable Doubt that the constitution has been violated in the submission of a constitutional amendment, it must be upheld by the courts. (Colo.) *People v. Sours*, 34.

11. CONSTITUTIONAL AMENDMENTS—New Article as.—The legislature may lawfully propose a new article to the state constitution to be submitted to the people as an amendment. (Colo.) *People v. Sours*, 34.

12. CONSTITUTIONAL AMENDMENTS.—Amendments by implication are permissible to a state constitution, and a constitutional provision limiting the power of the legislature to the proposal of amendments to one article refers to express amendments, and not to amendments by necessary implication. (Colo.) *People v. Sours*, 34.

13. CONSTITUTIONAL AMENDMENT may Embrace More Than One Subject, and a proposed constitutional amendment need not be restricted, like an ordinary legislative bill, to a single subject. (Colo.) *People v. Sours*, 34.

14. CONSTITUTIONAL AMENDMENT embracing several subjects, all of which are germane to the general subject of the amendment, is valid and may be submitted to the people as a single proposition. (Colo.) *People v. Sours*, 34.

See Taxation.

CONTAGIOUS DISEASE.

See Health; Municipal Corporations, 9, 10.

CONTRACTS.

Agreements for Benefit of Third Persons.

1. CONTRACT for Benefit of Third Person—Consideration.—In an action on a contract by a third person who is a beneficiary thereunder, it is not necessary to aver that some consideration moved from him to either of the original contracting parties. (Ind. App.) *McCoy v. McCoy*, 223.

2. CONTRACT—Enforcement by Third Person.—Where a third person is a beneficiary under a contract, he may maintain an action thereon without notice of acceptance or demand and the commencement of an action is both acceptance and demand. (Ind. App.) *McCoy v. McCoy*, 223.

3. CONTRACTS—Parties.—Beneficiaries, though not parties to contracts, may maintain actions directly thereon in their own names against the promisor, when the promise between the promisor and promisee is made upon a sufficient consideration for the benefit of third parties. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

Destruction of Subject Matter.

4. **BUILDING CONTRACT—Destruction of Subject Matter.**—A contractor is released from his undertaking to repair an old building and construct an annex thereto, where, after the work is practically finished and eighty per cent of the contract price received, the structure is so damaged by fire from lightning that completion is impossible without first restoring the old building; and this, although the contractor should have completed his contract before the fire, and although the contractee offers to restore the old building. (Ind.) *Krause v. Board of School Trustees*, 203.

5. **BUILDING CONTRACT—Choice of Inconsistent Remedy.**—Bringing an action against a building contractor for failure to proceed with his contract after performance has been rendered impossible by a fire, is a waiver of a prior breach of his contract in not completing the building before the fire. (Ind.) *Krause v. Board of School Trustees*, 203.

6. **BUILDING CONTRACT—Destruction of Subject Matter.**—If a building on which the contractor has paid out more than he has received is accidentally destroyed by fire before completion, the payments made by the owner and put into the building, are treated as an execution of the contract pro tanto, leaving the loss to the owner. (Ind.) *Krause v. Board of School Trustees*, 203.

7. **BUILDING CONTRACT—Destruction of Subject Matter.**—A provision in a contract for the repair of an old building and the construction of an annex thereto, that the owner shall not be responsible for any loss or damage that may happen to the work, does not prevent the loss from falling on the owner, where the structure, when practically finished, is so damaged by fire from lightning that the completion of the contract is impossible. (Ind.) *Krause v. Board of School Trustees*, 203.

8. **BUILDING CONTRACT—Destruction of Subject Matter.**—The fact that if a contractor had completed a building without delay, the owner might have insured it, has no bearing on the obligation of the contractor to perform his contract after the destruction of the building by fire. (Ind.) *Krause v. Board of School Trustees*, 203.

9. **BUILDING CONTRACT—Destruction of Subject Matter.**—Where a building contract provides that eighty per cent of the work shall be paid for as it progresses, which is done, and that the balance shall be paid when the building is completed, there can be no recovery as to such balance, either on the contract or on a common count, if the building is destroyed by fire before its completion. (Ind.) *Krause v. Board of School Trustees*, 203.

CORPORATIONS.*In General.*

1. **CORPORATIONS — Preferences — Trust Fund.**—The capital stock of every corporation is a trust fund for the payment of its debts, and its creditors have the right of priority of payment over any stockholder. (S. Dak.) *Portland Consolidated Min. Co. v. Rositer*, 726.

2. **CORPORATIONS—Insolvency—Preferences.**—If a portion of the directors of an insolvent corporation owning a certain part of causes of action against it assign them to a third person, who, after service of summons on such directors as vice-president and secretary of the corporation, has a default judgment entered under which all the property of the corporation is sold in satisfaction thereof amount-

ing to less than one-half of the value of the property, such judgment is fraudulent and void as to other creditors of the corporation. (S. Dak.) *Portland Consolidated Min. Co. v. Rossiter*, 726.

3. **CORPORATIONS—Partnership—Sale of Goods.**—A corporation may acquire, as against outsiders, part ownership of property bought in part with corporate funds in the progress of an attempted partnership with an individual, and when it sells such property and has acquired all of the interest of such individual therein, it alone is entitled to collect the purchase price. (S. C.) *Huguenot Mills v. Jempson & Co.*, 673.

4. **CORPORATIONS—Contract Ultra Vires—Subscription to Stock in Another Corporation.**—A subscription for stock in a land corporation made by a railroad company is ultra vires, although such subscription was made in the names of trustees for the company. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

5. **CORPORATIONS—Accommodation Indorsements.**—In the absence of express or necessarily implied power given in its charter, one corporation cannot indorse paper for the accommodation of another. Such act is ultra vires. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

Stockholders.

6. **CORPORATIONS—Relief of Minority Stockholders in Equity.** Courts of equity are prompt to redress the injuries of minority stockholders in corporations against the wrongdoing of the majority, after the former have sought relief through the corporation without success. The minority must first seek relief from the corporation, except in cases where that would be but an idle ceremony. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

7. **CORPORATIONS—Acts Ultra Vires—Estoppel to Attack.**—A stockholder in a corporation is estopped from attacking as unauthorized and ultra vires a corporate act, to which he has consented, or in the doing of which he has acquiesced an unreasonable length of time. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

8. **CORPORATIONS—Acts Ultra Vires—Estoppel Against Purchaser of Stock to Attack.**—If the owner of corporate stock is estopped to attack a corporate act, as unauthorized, because of his consent thereto or acquiescence therein for an unreasonable time, a purchaser of his stock is likewise estopped. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

9. **CORPORATIONS—Act Ultra Vires—Relief Against by Purchaser of Stock.**—Although a purchaser of stock in a corporation is estopped to attack as ultra vires a corporate act to which his vendor has consented, or long acquiesced in as to previous transactions, yet he may thus attack such act in so far as it creates new liabilities, arising after his purchase of the stock and the institution of his suit. (Tenn.) *McC Campbell v. Fountain Head R. R. Co.*, 731.

Stock.

10. **CORPORATE STOCK—Negotiability.**—While corporate stock is not negotiable in the full sense, the custom of business, the necessities of commerce, and the multitude of transactions tend more and more to force its transfer under the rules applicable to the sale of negotiable instruments. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

11. **CORPORATE STOCK—Secret Lien.**—A By-law Lien on corporate stock is not good as against a pledgee or transferee without notice. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

12. CORPORATE STOCK—Bona Fide Holder.—A Statement on a certificate of stock that it is transferable only on the books of the corporation does not charge a pledgee with notice of what can be learned from an examination of the books, including facts pointing toward the existence of a by-law lien on the stock. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

13. CORPORATE STOCK—Transfer on Books.—A Provision that stock is transferable only on the books of the corporation does not, as between the parties, preclude a transfer without an entry on the books. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

14. CORPORATE STOCK—Transfer Without Indorsement.—Where stock is delivered as security for the payment of a note, though without a transfer on the back of the scrip, and the note recites that the stock is deposited to secure the debt and that on default a sale may be made, a purchaser at the sale is entitled to a transfer of the stock on the books of the corporation, and to a new certificate. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

15. CORPORATE STOCK—Damages for Refusal to Transfer.—The measure of damages for refusing to make a transfer of stock on the books of the corporation, and issue a new certificate to a purchaser at a sale made by a pledgee of the shares, is the value of the stock at the time of the refusal. (Ga.) *Bank of Culloden v. Bank of Forsyth*, 115.

Foreign Corporations.

See Insurance, 1-3.

16. FOREIGN CORPORATIONS.—A State has the Right to Exclude a Foreign Corporation from Doing Business Therein or may permit it to transact business with its citizens and fix the terms and conditions on which this may be done. (N. Y.) *Woodward v. Mutual Reserve Life Ins. Co.*, 519.

17. CORPORATIONS, Foreign, Statutes, When Inapplicable to.—The statutes of Massachusetts keeping corporations in existence for three years after the expiration of their charters, or whose corporate existence has been terminated in any other manner, do not apply to foreign corporations. (Mass.) *Olds v. City Trust Safe Deposit etc. Co.*, 356.

18. CORPORATION, Foreign, Dissolution of—Jurisdiction of Court to Declare is not Presumed.—When a court, though of general jurisdiction, proceeds in matters relating to the dissolution of corporations only upon explicit legislative authority, it is not necessarily inferable from a statement of facts stating that the courts of another state entered a judgment declaring a corporation of such state dissolved, that such proceedings had been taken as gave the court jurisdiction to so declare. (Mass.) *Olds v. City Trust Safe Deposit etc. Co.*, 356.

19. STATUTE of Another State—Presumption.—There is no presumption in Massachusetts that the statutes of New York give power to any court of the latter state to dissolve a corporation thereof. (Mass.) *Olds v. City Trust Safe Deposit etc. Co.*, 356.

Process.

See Insurance, 1-3.

20. CORPORATION.—A Summons Setting Forth the full corporate name of a defendant corporation is not insufficient because it fails to recite that the defendant is a corporation. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

21. FOREIGN CORPORATIONS—Service of Process—Managing Agent.—A station agent of a railroad company organized in another state, who has authority to sell and collect for passenger tickets, and to receive and deliver freight and collect charges therefor for such company, is its managing agent, and service of summons upon him in an action against the company is service upon it. (N. Dak.) *Brown v. Chicago etc. Ry. Co.*, 564.

22. FOREIGN CORPORATIONS—Service of Process—Managing Agent.—An agent invested with the general conduct and control, at a particular place, of the business of a foreign corporation, is its managing agent upon whom service of summons may be made in an action against the corporation. (N. Dak.) *Brown v. Chicago etc. Ry. Co.*, 564.

COTENANCY.

See Tenancy in Common.

CRIMINAL LAW.

In General.

1. ALIBI—Reasonable Doubt.—If the evidence fairly raises the defense of an alibi, the jury should be instructed that if such evidence, in connection with the other testimony in the case, raises a reasonable doubt as to whether the accused was at the place of the crime, or at a different place, the defendant should be acquitted. (Tenn.) *Legere v. State*, 781.

2. TRIAL for Murder—Testimony of an Accomplice.—The accused is not entitled to an instruction advising the jury against a conviction on the uncorroborated testimony of an accomplice, if there is much circumstantial evidence pointing the same way. (Wis.) *Cupps v. State*, 996.

Misconduct of Jury.

3. CRIMINAL PRACTICE—New Trial.—If a motion for a new trial in a criminal case is made in good faith in proper time, on the ground of misconduct of the jury in separating, and of the officer in charge in permitting such separation, and a proper case is presented for the exercise of the trial court's discretion, which he refuses to exercise upon the ground that the motion comes too late, and after his jurisdiction has been exhausted, because judgment has been rendered and sentence passed, and an appeal granted, he is in error in refusing to exercise his discretion, and to set aside the order granting the appeal, in order that defendant may submit affidavits in support of his motion. (Tenn.) *Legere v. State*, 781.

4. JURY TRIAL—Actions by Third Persons Which cannot be Held to Unfairly Influence.—The fact that a person in no way interested in a criminal trial passes the jurors during the trial, says, "Good morning," and gives the officer in charge a small sum, with instructions to expend it for cigars for the use of the jurors, and that it is so spent, while it shows improper conduct on the part of the giver and the officer, does not warrant the disturbing of the verdict subsequently reached. (Wis.) *Cupps v. State*, 996.

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Crops growing, statute of frauds, agreements reserving, whether within, 234.

DAMAGES.

1. EVIDENCE—Physical Examination.—If it is sought to recover damages for a permanent personal injury, the trial court has author-

dinances, and conduct, it has recognized and treated the land as a public park. (Ill.) Village of Riverside v. MacLain, 164.

7. **MUNICIPAL CORPORATIONS—Dedication of Park—Base-ment for Preservation of.**—Purchasers of lots adjoining a tract of land within city limits, dedicated by the owner as a public park, and adjudged in a judicial proceeding to be a public park, have an easement therein as against the municipality to have such tract of land preserved as a public park. (Ill.) Village of Riverside v. MacLain, 164.

8. **MUNICIPAL CORPORATIONS—Dedication of Park—Right to Put Highway Through.**—A municipality has no power to put a highway through any portion of a public park, accepted as, and adjudicated to be, such park under a dedication of the land by the owner for that particular purpose. (Ill.) Village of Riverside v. MacLain, 164.

9. **MUNICIPAL CORPORATIONS—Dedication of Land to for Special Purpose.**—If land is consecrated to public use by a common-law dedication of the owner, the municipality, within whose limits the premises are situated, takes it, as trustee for the public, for the special uses designated by the dedicator, and it cannot employ such premises or any part thereof, for any other or additional purpose, especially if not actually necessary to the use for which the land is dedicated. (Ill.) Village of Riverside v. MacLain, 164.

10. **MUNICIPAL CORPORATIONS—Dedication of Land for Park—Right to Put Driveway Through.**—Statutory authority given to a municipality to construct driveways through public parks is confined to parks created under statutory authority, and does not extend to a park created by the owner of the land by dedication for that particular purpose. (Ill.) Riverside v. MacLain, 164.

11. **MUNICIPAL CORPORATIONS—Dedication of Land for Park—Injunction Against Highway.**—Owners of lots adjoining a tract of land within the limits of a city, dedicated for the purpose of a public park by the original owner, are entitled to an injunction to restrain the municipality from constructing a highway through such park, without showing any damage or injury to their lots therefrom. (Ill.) Village of Riverside v. MacLain, 164.

DEEDS.

1. **DEED—Acceptance.**—The Execution of a Mortgage by a grantee, on the land conveyed, shows an acceptance of the deed of conveyance. (Ind. App.) McCoy v. McCoy, 223.

2. **REGISTRATION OF DEED—Error in Initials of Name.**—A deed executed in the presence of "F. H. Harris," notary public, but registered as executed in the presence of "T. H. Harris," notary public, imparts constructive notice. (Ga.) Roberson v. The Downing Co., 128.

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of conditions precedent, 366.
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of earnings, 97.
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DESCENT AND DISTRIBUTION.

1. **ADVANCEMENTS—Release of Expectancy.**—If heirs have received equal advancements from their father they are entitled to share equally in such property as he thereafter accumulates, and of which he dies intestate, although some of such heirs have executed releases of all further interest in the estate. (Va.) *Headrick v. McDowell*, 843.

2. **ADVANCEMENTS—Intestate Estate.**—If an advancement has been made to an heir in the lifetime of the parent, who dies intestate, it must be brought into hotchpot by him who receives it, with the result that perfect equality may be attained between the heirs, with respect to the estate of the intestate. (Va.) *Headrick v. McDowell*, 843.

DISEASE.

See Health.

DIVORCE.

1. **DIVORCE—Alimony—Lien on Homestead.**—Under a statute providing that if divorce is granted for the fault of the husband, the court may allow to the wife such alimony as it may deem just, and may, from time to time, modify its orders in this respect, and enforce the payment of such allowance by a receiver, and may assign the homestead to the innocent person, the court may modify its original decree for alimony, in which no mention is made of the homestead, upon default in payment by the husband, so as to require him to pay a fixed sum, and may make it a lien upon the homestead in his possession. (S. Dak.) *Harding v. Harding*, 694.

2. **DIVORCE—Alimony—Sale of Homestead to Satisfy—Right to Redeem.**—Although the court is vested with power to declare alimony awarded the wife upon divorce a lien upon the husband's homestead, it exceeds its power and jurisdiction when it decrees that such homestead shall be immediately sold to satisfy such decree for alimony, and that the property shall be immediately delivered upon such sale to the purchaser, when the statute provides that the judgment creditor upon sale of his property under execution shall have one year in which to redeem therefrom. (S. Dak.) *Harding v. Harding*, 694.

3. **DIVORCE—Alimony—Sale of Homestead—Voidable Decree—Right to Redeem.**—A decree that the homestead of a divorced husband be immediately sold to satisfy a decree for alimony against him, and that the possession of the property shall be immediately delivered upon such sale to the purchaser, is voidable as depriving such husband of his statutory right to redeem his property from sale under execution. (S. Dak.) *Harding v. Harding*, 694.

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See Replevin.

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moneys received by saloon-keeper are not, 99.

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EASEMENTS.

1. **WAY OF NECESSITY.**—When a Grantor Conveys Land otherwise inaccessible, there is of necessity an implication that he unintentionally omitted to convey a means of access thereto; this implication entitles the land-locked grantee to a way out to whatever public or private roads furnished access to the original tract. (Ga.) *Gaines v. Lunsford*, 109.

2. **WAY OF NECESSITY.**—Connection with Private Road.—If the owner of a land-locked farm can reach a highway by means of another private or quasi public road, he is not under the necessity which alone entitles him to condemn the land of his neighbor as provided by the constitution of Georgia. (Ga.) *Gaines v. Lunsford*, 109.

3. **WAY OF NECESSITY.**—Road must be Necessary, not Merely Convenient.—The way of necessity contemplated by the Georgia constitution is not a way of convenience, nor is it intended to give the applicant the shortest route to market; if there is a defective road touching his land, or it is accessible without crossing his neighbor's property, the constitution does not warrant the taking of the latter's property to make a better highway. (Ga.) *Gaines v. Lunsford*, 109.

4. **WAY OF NECESSITY.**—The Fact that there is a Cut or Obstruction between a land owner's residence and a settlement road does not entitle him to a road across his neighbor's land to a highway. (Ga.) *Gaines v. Lunsford*, 109.

5. **WAY OF NECESSITY.**—Closing of Existing Road.—The fact that a settlement road touching one's premises may be closed does not justify the laying out of a way of necessity across adjoining lands. (Ga.) *Gaines v. Lunsford*, 109.

EJECTMENT.

See Railroads, 1, 2; Tenancy in Common.

ELECTION OF REMEDIES.

1. **ELECTION OF REMEDIES.**—Actions not Inconsistent.—One who supposes he has more than one remedy is not deprived of all remedy because he first tries a wrong one which is not inconsistent with his true and effectual remedy. (Ind. App.) *McCoy v. McCoy*, 223.

2. **ELECTION OF REMEDIES** is the Choosing between the different modes of procedure and relief allowed by law on the same state of facts, which modes may be termed coexisting remedies. (Ind. App.) *McCoy v. McCoy*, 223.

EMINENT DOMAIN.

1. **PUBLIC USE.**—Railroads.—If the use to be subserved by building a branch railroad is a public use, the fact that such road will inure to the advantage of a particular individual, or class of individuals, does not render the use any the less public. (Va.) *Zircle v. Southern Ry. Co.*, 805.

2. **PUBLIC USE.**—Railroads.—Whether the use to which a railroad is put is public or not may be determined by the fact that, where the use is public a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it cannot be deprived by the company without a reasonable excuse, and also by the fact that the state retains the power to regulate and control the

franchises of the company and to prescribe the amount of tolls and charges which it may lawfully collect. (Va.) *Zircle v. Southern Ry. Co.*, 805.

3. **EMINENT DOMAIN—Exercise of Right of by Railroads.**—If the legislature expressly delegates to railroad companies the power of eminent domain, such companies in the exercise of that power represent the sovereignty of the state, and may decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within such limitations their discretion is practically absolute, and while it is competent for the courts to supervise the exercise of the power delegated, they cannot invade the bounds set by the legislature, and will not undertake to control the discretion of the railroad companies in taking property for their use, unless there has been a very clear abuse of power. (Va.) *Zircle v. Southern Ry. Co.*, 805.

4. **EMINENT DOMAIN—Public Use.**—A railway built for the purpose of reaching an industrial enterprise is for a public use, and the railroad company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it. (Va.) *Zircle v. Southern Ry. Co.*, 805.

5. **EMINENT DOMAIN—Legislative Question.**—The question of the necessity, propriety or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional prohibition, is a legislative and not a judicial question. (Va.) *Zircle v. Southern Ry. Co.*, 805.

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EMPLOYER'S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 5-9.

EQUITY.

In General.

1. **EQUITY—Prevention of Multiplicity of Suits.**—If a large number of the inhabitants of a city are induced to give their promissory notes on the fraudulent representation by a railroad company that unless the notes are given its road will not be built to the city, but to a rival town, equity, in order to prevent a multiplicity of suits, will enjoin the delivery of the notes by one holding them in escrow, and restrain their transfer by the payee, and decree their surrender and cancellation. (Miss.) Crawford v. Mobile etc. R. R. Co., 476.

with men who had insulted his wife and sister, evidence as to the insult and of the complaint thereof made by the wife to her husband, is admissible as part of the *res gestae*, when the whole occurrence is so closely connected that it must be regarded as one and the same transaction. (Ky.) *Petrie v. Cartwright*, 274.

See Bills and Notes, 7-9; Damages; Homicide, 22-25; Witnesses.

EXCEPTIONS.

See Appeal and Error.

EXECUTION.

See Exemptions.

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EXECUTORS AND ADMINISTRATORS.

Estate of Living Person.

1. **EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Notice.**—The mere taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted under authority of a statute void because not providing for notice, is not such notice to such living person as will validate the proceedings. (N. Dak.) *Clapp v. Houg*, 589.

2. **EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Exercise of Police Power.**—The taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted by authority of a statute void because failing to provide for notice, cannot be upheld on the ground that such statute is a valid exercise of the police power of the state. (N. Dak.) *Clapp v. Houg*, 589.

3. **EXECUTORS AND ADMINISTRATORS—Administration on Estate of Living Person—Costs and Disbursements.**—The mere taking possession of the property of a living person supposed to be dead, by virtue of special letters of administration granted under authority of a statute void, because not providing for notice to such person, does not render his estate liable for costs and disbursements in administration, although the special administrator acted in good faith. (N. Dak.) *Clapp v. Houg*, 589.

Sale of Property.

4. **JUDICIAL SALES—Setting Aside for Irregularities.**—A judicial proceeding resulting in a sale of lands to pay a decedent's debts, which remains in full force and effect, will not be set aside after many years, in favor of the heirs, for irregularity except when equity requires it, even though no statute of limitations has run. (Ill.) *Mason v. Odum*, 180.

5. **JUDICIAL SALES—Presumption of Jurisdiction.**—Lapse of Many Years after an administrator's sale, and possession taken thereunder, raises the presumption that jurisdiction of the person of the defendant was acquired by the court ordering the sale, and that it acted within its jurisdiction and proceeded according to law. (Ill.) *Mason v. Odum*, 180.

6. JUDICIAL SALES.—Purchase by an Administrator at His Own Sale is merely voidable, and if the price accounted for as the proceeds of the sale exceeds the reasonable value of the property the sale may be ratified by the heirs by acquiescence. (Ill.) *Mason v. Odum*, 180.

Limitation of Actions.

7. JUDICIAL SALES.—Purchase by Administrator—Adverse Possession.—If an administrator purchases land at his own sale, and takes and keeps the open, visible, and adverse possession thereof under a claim of ownership for over twenty years thereafter, this is a bar to a bill for partition by the heirs, who are under no disability. (Ill.) *Mason v. Odum*, 180.

See Constitutional Law, 2.

EXEMPTIONS.

1. EXEMPTIONS.—Judgment for Costs recovered by a debtor on appeal in a successful attempt to resist the wrongful taking of his exempt property under a judgment in favor of the defendant is a judgment recovered in protecting his exemption, and is itself exempt, and not subject to setoff. (S. Dak.) *Long v. Collins*, 724.

2. EXEMPTION OF WAGES of Quasi Municipal Employé.—Where a watchman is employed, paid, and subject to discharge by a railway company, the fact that the city clothes him with power to make arrests and places him under the superintendence of the police department, does not make him a municipal employé whose wages are exempt from garnishment. (Ga.) *Tabb v. Mallette*, 78.

3. EXEMPTION.—Watchman not a Laborer.—A watchman employed by a railway company to guard and protect its property, and authorized by the city to make arrests, is not a laborer within the meaning of exemption laws, for the discharge of these functions requires the exercise of the intellectual faculties rather than manual labor. (Ga.) *Tabb v. Mallette*, 78.

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FACTORS.

1. A **FACTOR** is an Agent Employed to Sell, or to Purchase and Sell, goods or other personal property intrusted to his possession for compensation, commonly called factorage or commission. (Wis.) *Beardsley v. Schmidt*, 991.
2. **FACTORS**, Who are.—Persons who have first received goods as warehousemen, but are afterward authorized to sell them on commission, with instructions to use their own judgment as to the best obtainable price, are factors. (Wis.) *Beardsley v. Schmidt*, 991.
3. **THE FACT THAT FACTORS** Before Accepting an Offer for Goods Submit It to Their Principal for His Approval does not deprive them of the character of factors, nor of their right to sue for the purchase price in their own names. (Wis.) *Beardsley v. Schmidt*, 991.
4. A **FACTOR** has Implied Authority to sell in his own name, and in that name to maintain an action for the purchase price. (Wis.) *Beardsley v. Schmidt*, 991.
5. A **FACTOR** has, as Agent of the Principal, in the Absence of Some Stipulation to the Contrary, a Special Interest in the Property and its proceeds, and the right to control the same until he receives his compensation for his services rendered in respect thereto. (Wis.) *Beardsley v. Schmidt*, 991.
6. A **FACTOR** is to be Deemed a Trustee of an Express Trust, and as such, entitled to sue in his own name for the purchase price of property sold by him for his principal, under a statute providing that a trustee of an express trust may sue without joining with him the person for whose benefit the action is brought. (Wis.) *Beardsley v. Schmidt*, 991.
7. **FACTORS**.—It is not Essential to the Right of a Factor to Sue in His Own Name that he should have sold in that name. (Wis.) *Beardsley v. Schmidt*, 991.
8. **WHERE A FACTOR Sues** for the Purchase Price of Property Sold by Him for His Principal, the latter may control the litigation subject to due protection of the factor's special interest, unless such interest, consisting of legitimate charges against the property or its proceeds, equals, or is in excess of, the amount recoverable. (Wis.) *Beardsley v. Schmidt*, 991.

FELLOW-SERVANTS.

See Master and Servant, 10-23.

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See Boundaries.

FERRIES.

1. **INTERSTATE FERRIES**.—The State of Ohio may Establish ferries on its side of the Ohio river and fix the charges for ferrriage across to West Virginia. (W. Va.) *State v. Faudre*, 927.

2. INTERSTATE FERRIES.—A Law of West Virginia regulating ferry charges across the Ohio river does not apply to a ferry established by the state of Ohio and carrying a passenger from its shores to West Virginia. (W. Va.) *State v. Fandre*, 927.

FINDING LOST PROPERTY.

In General.

1. LOSS and Abandonment of Property.—The Distinction between losing and abandonment is, that one is involuntary, while the other is by intent or design. But the result is practically the same, if the owner does not appear to claim the property. In the one case the finder has the right of possession against all except the true owner; in the other, he acquires the absolute property by right of his occupancy. (Or.) *Ferguson v. Ray*, 648.

2. LOST or Abandoned Property.—A Piece of Gold-bearing Quartz found imbedded in the earth, it evidently having been detached from the ledge at some previous time by human agency, and having at one time been contained in a cloth sack, and the nearest trees bearing marks apparently made to aid in locating the property, is neither lost nor abandoned in the sense that the finder is entitled to it as against the owner of the soil. (Or.) *Ferguson v. Ray*, 648.

3. FOUND PROPERTY—Rights of Owner of the Soil.—If property, not treasure-trove, is found imbedded in the soil under circumstances repelling the idea that it has been lost, the presumption is that the possession of the article is in the owner of the locus in quo. (Or.) *Ferguson v. Ray*, 648.

4. FINDER OF BURIED MONEY.—If Workmen find money which has been buried or secreted on the premises occupied by their employer, and he obtains possession of it, they may maintain an action for its recovery, in order that they may make a lawful disposition of it. (Or.) *Danielson v. Roberts*, 627.

Treasure-trove.

5. LOST PROPERTY and Treasure-trove Distinguished.—Lost property is such as is found on the surface of the earth, and with which the owner has involuntarily parted; treasure-trove is money or coin found hidden in the earth or other private place, the owner being unknown. (Cr.) *Danielson v. Roberts*, 627.

6. TREASURE-TROVE.—Gold-bearing Quartz Found Buried in the earth where it evidently had been placed some years before is not treasure-trove. (Or.) *Ferguson v. Ray*, 648.

FISH NETS.

See Nuisance.

FLAG.

See Constitutional Law, 2.

FORCIBLE ENTRY AND DETAINER.

1. UNLAWFUL ENTRY AND DETAINER—Who Bound by Judgment.—If an action of unlawful entry and detainer is brought against a tenant alone without making the landlord a party thereto, the latter is not bound by the judgment rendered therein, although he had knowledge of the pendency of the action. (Tenn.) *Cope v. Payne*, 746.

2. UNLAWFUL ENTRY AND DETAINER—Equity Jurisdiction to Quiet Possession.—An action of unlawful entry and detainer will not lie to dispossess a purchaser under a decree of a court of competent jurisdiction placed in possession by an order of the court, and a court of equity will entertain an application to quiet and prevent a wrongful interference with such possession. (Tenn.) *Cope v. Payne*, 746.

FOREIGN CORPORATIONS.

See Corporations, 16-19.

FOREIGN JUDGMENTS.

See Judgments, 3-7.

FRAUD.

1. FALSE REPRESENTATIONS—Trial.—Instructions stating the effect of false and fraudulent representations, "with respect to a material inducement to the transaction" are not erroneous in not defining the term "material inducement." (Ill.) *Kehl v. Abram*, 158.

2. FRAUDULENT REPRESENTATIONS—Degree of Care Exercised—Question of Fact.—If it is alleged that the defendant made false representations in that he falsely represented to plaintiff that a note and trust deed sold by him to the latter were a valid and first lien upon the premises, the degree of prudence exercised by the plaintiff in the transaction is a question of fact for the jury to determine. (Ill.) *Kehl v. Abram*, 158.

3. FALSE REPRESENTATIONS OF FACT.—A false representation that a trust deed is a first lien upon premises, and that there are no prior mortgages or trust deeds upon them, is a representation of fact, and not a mere opinion. (Ill.) *Kehl v. Abram*, 158.

See Vendor and Vendee, 2.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS.—Promise to Pay the Debt of Another based upon forbearance to enforce immediately some subsisting lien is not within the statute of frauds if the release is a damage to the creditor, or a benefit to the person promised for. (S. C.) *Ellis & Co. v. Carroll*, 879.

2. SALES—Statute of Frauds.—An executory contract for the sale of goods, evidenced by a bill of the goods and a letter in response thereto, is not within the statute of frauds. (S. C.) *Huguenot Mills v. Jempson & Co.*, 673.

3. STATUTE OF FRAUDS—Contract to Convey.—A contract by a person to convey one-third of his estate of whatever nature acquired under his mother's will, or otherwise acquired or owned by him, sufficiently describes the property to be conveyed to satisfy the statute of frauds. Such property may be identified by parol evidence. (Ky.) *Moayon v. Moayon*, 503.

4. STATUTE OF FRAUDS—Exchange of Lands.—A statute prohibiting the enforcement of parol contracts for the sale of real estate applies with equal force to contracts for its exchange. (Ind. App.) *McCoy v. McCoy*, 223.

5. STATUTE OF FRAUDS—Failure to Plead Written Contract.—If no written contract for the exchange of real estate is pleaded, it will be presumed that the contract is oral. (Ind. App.) *McCoy v. McCoy*, 223.

6. STATUTE OF FRAUDS.—Part Performance of a Contract concerning real estate may take it out of the operation of the statute of frauds. (Ind. App.) *McCoy v. McCoy*, 223.

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GARNISHMENT.

GARNISHMENT, Sufficiency of.—To render an attachment of a debt due to the defendant valid, a copy of the warrant of attachment, and a notice showing the property attached, must be delivered to, and left with, the person against whom the debt exists. (N. Dak.) *Ireland v. Adair*, 561.

GAS.

1. GAS-WELL—Letting Off Gas Near Highway.—The owner of a gas-well situated near a highway may lawfully open it to allow the gas to blow out the accumulation of water, but he must do so with a due regard to the rights and safety of people using the highway. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

2. GAS-WELL—Letting Off Gas Near Highway.—Where a gas-well is situated near a highway, persons driving in the road have a right to assume that an agent of the owner of the well approaching it will not open it to blow out the water until they have passed, and are not chargeable with contributory negligence for failing to turn and fly from the mere prospect of danger. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

3. GAS-WELL—Blowing Off Gas—Proximate Cause.—If a gas-well is negligently opened to blow out the water, thereby frightening a team in the highway close by, and the driver breaks a line in attempting to control the horses, which causes him to fall from the wagon, the blowing off of the well, and not the weak condition of the line, is the proximate cause of his injury. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

GIFTS.

1. GIFTS.—Notes of a Donor are not a good subject of a gift, but are mere promises to pay, in future, not complete until payment, and cannot be enforced, either against the donor, or against his estate after his death. (Tenn.) *Shugart v. Shugart*, 777.

2. GIFTS—Delivery.—A gift, to be valid, must be executed, and the property or money must be delivered. There must be such an actual change of possession as that the donor loses the dominion and control over it. (Tenn.) *Shugart v. Shugart*, 777.

3. GIFTS—Certificate of Deposit.—Mere manual delivery of an unindorsed certificate of deposit, payable to the donor's order, does not vest title so as to constitute a gift, especially if not made for a valuable consideration. (Tenn.) *Shugart v. Shugart*, 777.

4. GIFTS—Delivery.—To constitute a valid gift the intention of the donor to part with the dominion over, and control of, the subject of the gift must clearly appear. (Tenn.) *Shugart v. Shugart*, 777.

HEALTH.

1. LIABILITY OF HEALTH BOARDS and Others Exercising Quasi Judicial Powers.—Though a health officer is vested with quasi judicial authority to determine whether property is dangerous to the public health, and to destroy it if so, he is personally liable for property destroyed by him in the honest exercise of his judgment, if such property is not in fact dangerous to the public health, and its owner has no means of redress other than by action against such officer. (Wis.) *Lowe v. Conroy*, 983.

2. HEALTH OFFICER—Destruction of Property by, What Establishes.—If the evidence shows that a health officer made a written order directing the destruction of certain property and gave personal directions to his deputy and others, who actually destroyed the property, and that they all proceeded under his direction, there can be no doubt that the court did not err in answering in the affirmative the question whether such officer caused the destruction of the property. (Wis.) *Lowe v. Conroy*, 983.

3. BOARDS OF HEALTH, Powers of to Destroy Property.—The legislature may grant to boards of health authority to employ all means required to protect the public health, and, if necessary to that end, to destroy private property. (Wis.) *Lowe v. Conroy*, 983.

4. BOARDS OF HEALTH, Power of to Destroy Animals Affected With Disease.—The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it within the class of cases which can only be dealt with effectually by the destruction of the animals afflicted. (Wis.) *Lowe v. Conroy*, 983.

5. BOARDS OF HEALTH, Determination of, that Disease Exists or that Property is a Nuisance.—Though a board of health may be authorized to abate a source of danger to the public health, and, if necessary, to destroy it even when it consists of private property, yet the board acts at its peril, if the property is not in fact a nuisance or source of danger, if the owner is not first given an opportunity to be heard at a trial for the purpose of showing that his property is not a nuisance nor dangerous to the public health. (Wis.) *Lowe v. Conroy*, 983.

6. A BOARD OF HEALTH is Liable to an Action for Summarily Destroying Property on the ground that it is a nuisance or dangerous to the public health, if the owner can show that it was neither. (Wis.) *Lowe v. Conroy*, 983.

7. A MUNICIPAL CORPORATION is not Liable for the Acts of Its Board of Health or Health Officer in Summarily Destroying Property on the ground that it is dangerous to the public health, though such danger did not in fact exist. (Wis.) *Lowe v. Conroy*, 983.

See *Municipal Corporations*, 9, 10.

HIGHWAYS.

See *Dedication*, 8-10; *Gas*.

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Highways, eminent domain, power of, exercising in behalf of public and private, 826-828.

HOMESTEAD.

1. **HOMESTEADS—Removal of Cloud.—Equity has Jurisdiction,** at the suit of a wife, to remove a levy upon, and execution sale of, her husband's homestead. (Mich.) *Burkhardt v. Walker & Son*, 386.

2. **HOMESTEADS—Sale Under Execution.—**While property is a homestead, there is no interest therein which can be taken and sold under execution against the owner. (Mich.) *Burkhardt v. Walker & Son*, 386.

3. **HOMESTEADS—Abandonment.—**A temporary removal from a homestead with the intention of a speedy return does not constitute an abandonment. (Mich.) *Burkhardt v. Walker & Son*, 386.

4. **HOMESTEADS—Abandonment—Conveyance.—**A conveyance of a homestead by husband and wife to a third person, who immediately reconveys to the wife for the purpose of placing the title in her, is not an abandonment of the homestead. (Mich.) *Burkhardt v. Walker & Son*, 386.

5. **HOMESTEADS—Survivor—Taxes and Repairs.—**The rule requiring the tenant for life to pay all general taxes and keep up general repairs, applies to the surviving husband or wife occupying the homestead as such, and he or she cannot claim compensation therefor as against the remaindermen. (S. Dak.) *Wells v. Sweeney*, 713.

6. **HOMESTEADS—Survivor—Improvements.—**The surviving husband in possession of the homestead is not entitled to make permanent improvements thereon, and make them a charge upon the property as against the minor children. (S. Dak.) *Wells v. Sweeney*, 713.

7. **PARTITION OF HOMESTEAD.—**During the lifetime of the surviving husband, wife or any minor child, the homestead, possessed and occupied as such, cannot be partitioned among the heirs at law, except by consent of all of the interested parties. (S. Dak.) *Wells v. Sweeney*, 713.

8. **PARTITION OF HOMESTEAD.—**The surviving husband in possession of the homestead owned by his deceased wife, and claiming his homestead rights therein, cannot maintain partition against the heirs of such deceased wife. (S. Dak.) *Wells v. Sweeney*, 713.

See Divorce.

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HOMICIDE.

- 1. HOMICIDE—Carrying Concealed Weapons in Violation of Law.** If, while two men are engaged in a friendly scuffle, a revolver on the person of one of them is accidentally discharged, killing the other, the mere fact that the owner carried the weapon in violation of law does not render him guilty of the crime of involuntary manslaughter. (Ind.) *Potter v. State*, 198.
- 2. HOMICIDE by Peace Officer to Prevent Escape.**—A peace officer acting without a warrant is not justified in killing a person while fleeing from arrest for a crime which is only a misdemeanor, although such officer acts upon his suspicion that a felony has been committed. (Ky.) *Petrie v. Cartwright*, 274.

3. **MURDER—Accidental Killing—Burden of Proof.**—If accidental killing is set up as a defense to murder, it is not an affirmative defense, and the prosecution must overcome such plea by a preponderance of the evidence, and beyond a reasonable doubt. (S. C.) *State v. McDaniel*, 661.

Malice and Premeditation.

4. **MURDER—Malice.**—An instruction in a murder case that "in this case, if defendant intentionally, wrongfully, killed deceased without justification or excuse, then he killed him with malice, and that would constitute murder," is not erroneous as charging on the facts, and properly defines malice and murder. (S. C.) *State v. McDaniel*, 661.

5. **MURDER.**—Malice is Presumed from an intentional killing of a human being. (S. C.) *State v. McDaniel*, 661.

6. **MURDER.**—The Word "Premeditated," as used in the statute, on the subject of felonious homicide, has no other signification than that the design to kill must precede the homicidal act. (Wis.) *Cupps v. State*, 996.

Motive.

7. **MURDER.**—Absence of Known Motive on the Part of an Accused does not show a conviction of murder in the first degree to be unwarranted when the evidence clearly, in the judgment of the jury, established an intention, without justification or excuse, to destroy human life. (Wis.) *Cupps v. State*, 996.

8. **MURDER—Evidence of Motive or Want of Motive in Prosecutions for.**—While it is competent for the prosecution under an indictment for murder to show motive, it will not of itself establish the charge; and, while it is competent for the defense to establish want of motive, it does not constitute a defense nor necessarily rebut evidence by itself satisfactorily establishing the guilt of the accused, even so as to raise a reasonable doubt on the question. The presence or absence of motive is but a mere evidentiary circumstance to be given such weight by the jury as they deem it entitled to under all the circumstances. (Wis.) *Cupps v. State*, 996.

Murder.

9. **MURDER in the First Degree.**—It is sufficient to sustain a verdict of murder in the first degree that the evidence tends to prove that the person committing the homicide had, at the time of inflicting the fatal wound, a design to take human life and inflicted the wound for the purpose of accomplishing that design, from which death ensued, there being no circumstance to render the homicide excusable or justifiable. (Wis.) *Cupps v. State*, 996.

10. **MURDER in the First Degree, Presumption to Support Verdict of.**—From the circumstance of the taking of the life of a human being by an act of a nature naturally and probably calculated to cause death, the law presumes that he who perpetrated the act foresaw and intended the result which followed, and must hence be guilty of the highest offense of criminal homicide known to the law, in the absence of evidence showing that the homicide was justifiable or excusable, or sufficiently rebutting the presumption of intent to take human life to raise a reasonable doubt on the question. (Wis.) *Cupps v. State*, 996.

11. **MURDER in the First Degree—Evidence Sufficient for the Prosecution.**—When it is made to appear in a prosecution of an indictment for murder that the accused fired the fatal shot, the weapon

being aimed at a vital part of the body, and that death ensued as a natural and probable result, the presumption of fact as to the intention to take human life, in the absence of explanatory circumstances or evidence, makes a *prima facie* case for the prosecution. The state need not negative any probability that the offense was the result of an accident, or that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying him altogether. (Wis.) *Cupps v. State*, 996.

12. **MURDER—Burden of Proof, When Must be Assumed by the Accused.**—When the evidence, on the prosecution of an indictment for murder, shows the killing of the decedent by the accused by shooting, and that the weapon was aimed at a vital part of the body, the accused must then assume the burden of proving that there was no intent to take life, or that the killing was justifiable or excusable, or, at least, of raising a reasonable doubt in his favor. (Wis.) *Cupps v. State*, 996.

13. **MURDER.—In the Absence of Evidence to the Contrary, He Who Takes the Life of Another by the inflicting of a wound or some act naturally and probably calculated to produce death is presumed to have intended that result, and to be guilty of murder in the first degree at the common law and under the statutes of Wisconsin.** (Wis.) *Cupps v. State*, 996.

14. **MURDER at the Common Law was Susceptible of Being Established by the presumption arising from the fact of killing by an unexplained act naturally and probably calculated to produce death.** (Wis.) *Cupps v. State*, 996.

15. **MURDER in the First Degree, Under the Statutes of Wisconsin, may be Established, as may murder at the common law, by evidence showing the killing of one human being by another by the unexplained act of the latter, naturally and probably calculated to produce death.** (Wis.) *Cupps v. State*, 996.

16. **MURDER in the First Degree.**—Where there is an intent to kill, the homicide is murder in the first degree, if not excusable nor justifiable, because all the deliberation necessary is involved in the formation of the purpose to kill before the perpetration of the fatal act. This formed design or intent need not exist at any appreciable time or time sufficient for the intervention of any independent element between it and the fatal act. (Wis.) *Cupps v. State*, 996.

Trial.

17. **MURDER—Taking from the Jury the Question Whether the Killing was Justifiable, When not Improper.**—An instruction on a trial for murder that there is no evidence tending to show, and that there is no claim made, that the defendant killed the decedent under such circumstances as rendered the killing justifiable or excusable, and that the defendant insists that he did not contribute to the death of the decedent, and hence that the only question to be determined is whether the defendant killed the decedent, and if he did, then was such killing perpetrated pursuant to a premeditated design to take human life, is not erroneous, though it takes from the jury the question whether the killing was justifiable or excusable, if in fact there was no evidence tending to show that it was so. (Wis.) *Cupps v. State*, 996.

18. **TRIAL—Reference to Facts in Instructions to the Jury.**—The court may, even in a criminal trial, properly speak of evidentiary facts as established as to which the evidence is so conclusive as not to leave any room for direction in respect thereto. (Wis.) *Cupps v. State*, 996.

19. TRIAL—Confining Consideration of the Jury to Question Whether Murder in the First Degree has been Committed.—Where the evidence in a prosecution for murder in the first degree will support the full charge and in no reasonable view of it will support conviction for any less homicidal offense, it is competent for the court to say that to the jury and to restrict their deliberations accordingly. (Wis.) *Cupps v. State*, 996.

20. TRIAL—Mode of Obtaining the Submission to the Jury of the Degree of Crime in a Homicide Case.—A general exception to the submission of only murder in the first degree does not raise the question of whether a lesser degree of homicidal offense should be submitted. The only way this can be done is by specially requesting the court to instruct the jury as to the lesser degree. (Wis.) *Cupps v. State*, 996.

21. TRIAL—Murder—Instruction to the Jury—Omission of the Word "Care."—The court may properly refuse to instruct the jury, on a trial for murder, that they must scrutinize the evidence with the utmost caution and care, if it does instruct them that in scrutinizing the evidence they should exercise the utmost caution, employ all the reason, prudence, judgment, and discrimination that they possess and would summon to their aid in the most important affairs of life. (Wis.) *Cupps v. State*, 996.

Evidence.

22. MURDER—Evidence of the Good Character of the Accused does not render his conviction of murder in the first degree unjustifiable where the evidence is sufficient to satisfy the jury beyond a reasonable doubt that he killed a human being by an intentional act naturally and probably calculated to produce death. (Wis.) *Cupps v. State*, 996.

23. MURDER—Evidence.—Reputation of Deceased for Drunkenness is not relevant or admissible on a murder trial when the defense is accidental killing and the issue is whether or not the deceased was treacherous and violent when drinking. (S. C.) *State v. McDaniel*, 661.

24. MURDER—Evidence.—The relations between the deceased and the defendant, whether friendly or not, may be shown upon a trial for murder, and these may be shown by the effort of the defendant to secure the election of another person as town marshal at the time deceased was elected to that position. (S. C.) *State v. McDaniel*, 661.

25. MURDER—Evidence that the Deceased had no Power Burns on His Hands is admissible on a murder trial, in reply to evidence tending to prove that the deceased had hold of the pistol when shot. (S. C.) *State v. McDaniel*, 661.

HUSBAND AND WIFE.

In General.

1. HUSBAND AND WIFE—Right of Surviving Husband to Personality of Wife.—A surviving husband is entitled to take as his own funds belonging to his deceased wife on deposit in a bank, coming to her from her father's estate and kept and used as her own. (Tenn.) *Shugart v. Shugart*, 777.

2. HUSBAND AND WIFE—Contract Between.—If a contract between husband and wife, by which he agrees to convey property for the benefit of their children, is just and reasonable, and would be

good at law if made by the husband with a trustee for the wife, it will be upheld and enforced in equity. (Ky.) *Moayon v. Moayon*, 303.

3. HUSBAND AND WIFE—Consideration for Contract Between. If husband and wife are living apart and she has sufficient ground for divorce and has prepared a petition therefor, her forgiving him and the resumption of marital relations is sufficient consideration for his agreement to convey property for their children. (Ky.) *Moayon v. Moayon*, 303.

4. HUSBAND AND WIFE—Specific Performance of Husband's Contract—Mutuality of Remedy.—If a husband and wife living apart, she having a ground for divorce, mutually agree to again live together as husband and wife, and he, in consideration therefor, agrees to convey property for the benefit of their children, and marital relations are resumed between them prior to the execution of such conveyance, it is no defense to specific performance of his contract to convey, that there is no mutuality of remedy because he cannot thereafter compel his wife to live with him. (Ky.) *Moayon v. Moayon*, 303.

Estate by Entireties.

5. TENANCY BY THE ENTIRETIES, When Created.—A deed to a man and woman vests title in them as tenants by the entireties, if they are husband and wife, though the grantees did not have any intent what technical estate should be conveyed to them. (Mass.) *McLaughlin v. Rice*, 339.

6. TENANCY BY THE ENTIRETIES.—On the Death of a Husband, when a deed to real property has been made to him and his wife during coverture, she becomes the sole owner of the property. (Mass.) *McLaughlin v. Rice*, 339.

7. TENANCY BY ENTIRETIES, Extrinsic Evidence of.—When a conveyance is to a man and woman, extrinsic evidence is admissible to prove that they were husband and wife, and hence received the title as tenants by the entireties. (Mass.) *McLaughlin v. Rice*, 339.

8. ESTATE BY ENTIRETIES—Liability for Husband's Debt.—Land held by husband and wife as tenants by entireties is not liable to be sold on execution to satisfy a judgment against him alone. (Ind. App.) *Mercer v. Coomler*, 252.

9. ESTATE BY ENTIRETIES—Proceeds of Liability for Husband's Debt.—Where a husband and wife convey property and use part of the proceeds to pay for land which they take as tenants by the entireties, a judgment owned by them and recovered against a railway company for taking a part of such land is not subject to an execution against the husband alone upon a judgment for a breach of warranty in the first conveyance. (Ind. App.) *Mercer v. Coomler*, 252.

Married Women.

See Adverse Possession, 5.

10. MARRIED WOMEN.—A Decree to Sell in Fee the Land of a Married Woman, not her separate estate, for a debt made during coverture, is void in West Virginia; and so is a decree selling in fee her separate estate for a debt made during coverture and before chapter 3, Acts of 1893, Code of 1899, chapter 66, section 15. (W. Va.) *Waldron v. Harvey*, 959.

11. MARRIED WOMEN—Estoppel to Assert Title.—A married woman cannot lose her title to land, whether or not it is separate estate, by estoppel in pais. (W. Va.) *Waldron v. Harvey*, 959.

12. MARRIED WOMEN—Estoppel to Assert Title.—An admission by a married woman in a conversation that another person owns her land, which is a mere mistaken opinion, not misleading anyone to outlay, cannot pass the title. (W. Va.) *Waldron v. Harvey*, 959.

13. MARRIED WOMEN.—Laches cannot be Imputed to a married woman to defeat her right to land not her separate estate. (W. Va.) *Waldron v. Harvey*, 959.

INFANTS.

1. INFANT—Service of Process on Parent, Necessity for.—Under the Mississippi statutes, a judgment against an infant is void if the record fails to show that process for him has been served upon his father, mother, or guardian, or that he has neither in the state. (Miss.) *Gibson v. Currier*, 442.

2. INFANT—Service of Process on Parent, Sufficiency of.—A statute requiring process against an infant to be served on his father, mother, or guardian, is not complied with by service on a parent in his capacity as defendant only; where the parent is also a party defendant, he must be specially served for the infant in order to bring the latter before the court. (Miss.) *Gibson v. Currier*, 442.

See Adverse Possession, 6.

INJUNCTIONS.

See Nuisance; Trade Names.

INSURANCE.

Foreign Companies.

1. FOREIGN INSURANCE CORPORATIONS—Effect of Attempted Withdrawal from the State.—If a foreign corporation complies with the conditions of a statute of the state to become entitled to do business therein and commences issuing policies, its obligations toward its policy-holders in that regard is precisely the same as if its promises to the state had been incorporated in the policies, and therefore, whether it continues to do business in the state or not, policy-holders may commence actions by service of process upon the Secretary of State, in the manner and under the circumstances designated in the state statute. (N. Y.) *Woodward v. Mutual Reserve Life Ins. Co.*, 519.

2. FOREIGN CORPORATIONS—Statutes Changing Officers of the State on Whom Service of Process may be Made.—If, after a foreign corporation commences doing business in a state, and, as required by the statute, has appointed an agent upon whom, or on the Secretary of the State, service of process may be made, such statute is amended so as to require such corporation to execute an instrument appointing the insurance commissioner as its agent on whom process against it may be served, and such an instrument is executed after such amendment, service of process thereafter made on such commissioner gives the court jurisdiction of such corporation. The power of the legislative department of the state and the corporation to accomplish such an object cannot be doubted. (N. Y.) *Woodward v. Mutual Reserve Life Ins. Co.*, 519.

3. FOREIGN CORPORATIONS—Jurisdiction of State Courts Over.—Though a State Court Practically Drives a Foreign Corporation Out of the State, it cannot affect rights already secured to policy-holders who had entered into contract relations with the cor-

poration. If it files a revocation of its designation of the insurance commissioner as a person on whom service of process against it may be made, such revocation cannot operate as against pre-existing policy-holders, and a judgment in their favor founded on service of process on him is valid and enforceable in another state. (N. Y.) *Woodward v. Mutual Reserve Life Ins. Co.*, 519.

Reinsurance.

4. **INSURANCE—Reinsurance** is an insurance by the first insurer of the whole or of some part of his interest in the risk created by his contract of insurance. Reinsurance is a contract that one insurer makes with another to protect the first from the risk he has already assumed. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

5. **INSURANCE—Reinsurance—Privity.**—Generally, a contract of reinsurance operates solely between the insurer and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. Hence, the former is in no respect liable, either as surety or otherwise, to the latter. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

6. **INSURANCE—Reinsurance—Direct Liability** may be incurred by the reinsurer to the originally insured, if the intention to create it sufficiently appears from the contract of reinsurance. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

7. **INSURANCE—Reinsurance—Liability to Originally Insured.** If, in reinsuring risks for which policies are outstanding, the reinsurer contracts with the reinsured to assume the policies and to pay the holders thereof all such sums as the reinsured may become liable to pay, the original policy-holders suffering loss may recover from the reinsurer directly, although not named in the contract. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

8. **INSURANCE—Reinsurance—Liability to Originally Insured Policy-holder.**—If an original insurer sells its business and goodwill to another person, and the latter, in consideration thereof, reinsures the risks of the first insurer, and contracts to pay losses under its outstanding policies, the reinsurer becomes liable to the originally insured policy-holders. (Tenn.) *Ruohs v. Traders' Fire Ins. Co.*, 790.

Premiums.

9. **INSURANCE, Fire—Waiver of Payment of Premiums.**—If a person, upon insuring his property, gives notes for the payment of deferred premiums, under a policy providing that if any installment of premium is not paid when due, the insurer shall not be liable for loss during such default, and that the policy shall lapse until payment is made, and the insurer upon the delinquency of the insured in the payment of an installment of the premiums, retains the notes, demands payment, and continues to demand payment in full of such installment at different times and until long after it is due, he thereby waives the conditions in the policy providing for lapse thereof during default and continues the policy in force. (Ky.) *Walls v. Home Ins. Co.*, 298.

10. **INSURANCE—Check as Payment of Premium—Evidence.**—If a check is sent as payment of an installment of premium on an insurance policy, but is not received nor accepted as payment, nor pleaded as such, nor ever paid, and the insured did not at any time after the check was drawn have funds in the drawee bank, sufficient to pay it, the mailing and sending of the check is not payment of the installment of premium due, but in an action to recover on the

policy, evidence of the mailing of such check is admissible to show that the insured had not abandoned his contract, and that he considered himself bound thereon. (Ky.) *Walls v. Home Ins. Co.*, 298.

Forfeitures—Agents.

11. **INSURANCE, FIRE—Waiver of Forfeiture.**—Conditions in a policy of fire insurance which are for the benefit of the insurer, and the breach of which may operate a forfeiture, may be waived by the insurer, or his lawful agent. (Va.) *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 846.

12. **INSURANCE, FIRE—Waiver of Forfeiture by Agent.**—If the general agent of an insurance company applies to an insured to renew his policy and is informed by the latter that he has contracted to sell the insured property, has put the purchaser in possession, and received part of the purchase price, giving a full statement as to the condition of the title and the ownership, and such agent, without written application, writes and delivers a new policy on the property, which he states is sufficient to meet the situation disclosed, and receives the premium, the insurer is estopped to set up a forfeiture of the policy by reason of conditions therein rendering it void if the interest of the insured be other than unconditional and sole ownership, unless otherwise provided by agreement indorsed on the policy, and that no agent of the insurer can waive any condition of the policy except by written agreement indorsed thereon or annexed thereto. (Va.) *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 846.

13. **INSURANCE—Estoppel to Deny Acts of Agent.**—An insurance company is estopped to say that an agent of its own selection has exceeded his powers, and has not communicated to it facts made known to him by the assured, and that he has no authority to waive conditions in a policy, notwithstanding an inhibition therein, unless it can be shown that special limitations upon the power of the agent are known to the assured, or plainly appear from the nature of the agent's employment. (Va.) *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 846.

Fire Insurance.

14. **INSURANCE—Insurable Interest.**—One Who Purchases Property Under a Conditional Sale, the title to remain in the vendor until full payment is made, has an insurable interest, but such interest is not that of an owner. (Mass.) *Tabbutt v. American Ins. Co.*, 353.

15. **INSURANCE AGAINST FIRE—Nature of Contract.**—A contract for insurance against fire in the form prescribed by the statutes of Massachusetts is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire. (Mass.) *Tabbutt v. American Ins. Co.*, 353.

16. **INSURANCE AGAINST FIRE—Measure of Indemnity.**—Where the Insured Holds the Property under a Conditional Sale, he cannot, on its destruction by fire, recover for the full value of the property, but only the sum which he has paid under the contract of sale, if it stipulates that the title shall remain in the vendor until full payment has been made, and there is nothing to show that the purchaser has suffered any damage other than the loss of his payments. (Mass.) *Tabbutt v. American Ins. Co.*, 353.

Life Insurance.

17. **INSURANCE, LIFE—Evidence—Fraud.**—In order to avoid a life insurance policy for fraud, it is competent to show that such

24. BENEFIT SOCIETY—Transfer of Beneficiary's Interest.—A member of a benefit society may, with the assent of the beneficiary, make a contract with a third person whereby the latter obtains a vested interest in the fund designated in the certificate, provided the contract is not opposed to public policy. (Or.) *Brett v. Warnick*, 639.

25. BENEFIT SOCIETY—Assignment of Certificate.—A cousin of a member of a benefit society, while he has not sufficient blood relationship to have an insurable interest in the life of the assured, may take an assignment of the benefit certificate, the rules of the society not inhibiting it and the beneficiaries consenting, as security for advances made on the faith of the agreement, if the transaction is conceived in good faith, and not to avoid the inhibition of the law against wagering contracts. (Or.) *Brett v. Warnick*, 639.

Accident Insurance.

26. INSURANCE AGAINST ACCIDENT.—It is a Voluntary Exposure to Unnecessary Danger to engage in riding a steeplechase. (Mass.) *Smith v. Aetna Life Ins. Co.*, 326.

27. INSURANCE AGAINST ACCIDENT.—The Knowledge by an Agent of the Insurer, before issuing a policy, that the insured occasionally rode steeplechase races does not prevent the insurer from avoiding the policy, on the ground that the insured was injured while riding in a steeplechase, and that such riding was a voluntary exposure to unnecessary danger. (Mass.) *Smith v. Aetna Life Ins. Co.*, 326.

28. INSURANCE, ACCIDENT—Delivery of Policy.—If an accident insurance policy is sent by the insurer to a local agent to be by him delivered to the insured, such agent is not the agent of the insured so as to effect a valid contract of insurance different from, and inconsistent with, the one applied for. (Mich.) *Robinson v. United States Ben. Soc.*, 436.

29. INSURANCE, ACCIDENT—Application Contract, When Complete.—If an application for accident insurance provides that the contract shall be complete when received at the insurer's office and accepted by its secretary, the application accompanied by the premium and their acceptance by the insurer forms the contract of insurance until the policy is issued and received. (Mich.) *Robinson v. United States Ben. Soc.*, 436.

30. INSURANCE, ACCIDENT—Application and Policy Inconsistent Therewith.—If an application for accident insurance is received and accepted by the insurer, the applicant is not bound by a policy containing conditions inconsistent with such application, which is issued and sent to a local insurance agent for delivery, until such applicant has had an opportunity to ratify or waive such inconsistent provisions. (Mich.) *Robinson v. United States Ben. Soc.*, 436.

See Alteration of Instruments.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—Civil Damages.—Under a statute providing that a married woman may maintain a suit on a retail liquor dealer's bond for "all damages sustained by her or her children by reason of the sale of liquor," a widow may recover on such bond for loss of support caused by the death of her husband resulting from a sale of liquor to him. (S. Dak.) *Stafford v. Levinger*, 686.

JOINT TORT-FEASOR.

See Torts, 2.

JOURNALS OF HOUSE.

See Statutes, 1, 2; Municipal Corporations, 1-4.

JUDGMENTS.*In General.*

1. **JUDGMENTS Non Obstante Veredicto.**—If there is no special verdict inconsistent with the general verdict, a judgment non obstante veredicto is erroneous. (Mich.) Central Sav. Bank v. O'Connor, 433.

2. **JUDGMENTS Bind Only Parties and Privies**, and mere knowledge of the pendency of the action will not bind one not a party thereto. (Tenn.) Cope v. Payne, 746.

3. **JUDGMENT—Priority Among Assignees.**—Where one-fifteenth of a judgment in foreclosure proceedings is assigned to each of twelve persons, the several portions of the debt being due and payable at once, the assignments being all made at one time, and the assignor retaining three-fifteenths of the judgment, and eight of the assignees reassign to a third person, and the other four reassign to the judgment plaintiff, the twelve-fifteenths, even after their reassignment, stand on an equality and have priority over the three-fifteenths. The question is not affected by the fact that the twelve assignees incur expense in defending against an unauthorized tax sale. (Ind. App.) Alden v. White, 261.

4. **JUDGMENT—How Attackable.**—A Void Decree may be reversed on appeal or bill of review, or attacked collaterally. (W. Va.) Waldron v. Harvey, 959.

Of Sister States.

5. **JUDGMENT OF SISTER STATE.**—Want of Jurisdiction may be Shown by Extrinsic Evidence, even against the recital of a judgment record of a sister state, that defendant was served or appeared by attorney or of any other jurisdictional fact. (N. Y.) Woodward v. Mutual Reserve Life Ins. Co., 519.

6. **JUDGMENTS of a Court of a Sister State, Conflict of Laws as to Defenses to.**—If a person is sued in Massachusetts upon a judgment pronounced against him in another state, his defenses are regulated by the laws of Massachusetts, and not by the laws of the state wherein the judgment was rendered. (Mass.) Chicago Title etc. Co. v. Smith, 350.

7. **JUDGMENT of a Court of a Sister State, Defense of Want of Service of Process.**—Though the defendant against whom an action is brought on a judgment rendered in another state was a resident thereof when the judgment was rendered, he may plead and prove that he was not served with process and did not authorize an appearance in the action in which the judgment was entered. (Mass.) Chicago Title etc. Co. v. Smith, 350.

Note.

Judgment for alimony, effect of, and whether puts wife in position of a judgment creditor, 702.

for alimony, lien of, 703-705, 709.

See Attachment, 3; Pleading, 5-8.

JUDICIAL NOTICE.

See Evidence, 5.

JUDICIAL SALES.

1. **VOID JUDICIAL SALE.**—A Purchaser from a Purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. (W. Va.) *Waldron v. Harvey*, 959.

2. **LIMITATION OF ACTIONS**—Purchaser at Judicial Sale.—The defense of the two year statute of limitations cannot be raised by a purchaser under a decree of court who makes no actual payment; no sham payment or subterfuge will do. (Miss.) *Gibson v. Currier*, 442.

See Executors and Administrators, 4-6.

Note.

Judicial Sales, agreements to permit redemption, whether within the statute of frauds, 244.

agreements to purchase lands at or to convey to another, whether within the statute of frauds, 236.

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Note.

Laborers, who are within the meaning of the exemption laws, 83-94.

LACHES.

See Equity, 3-5.

LEGISLATURE.

See Constitutional Law; Statutes.

LETTERS.

See Evidence, 1-3.

LIENS.

1. **COMMON-LAW LIEN.**—The Right of Possession of the chattel is all that is secured by a common-law lien thereon for work and labor performed. (W. Va.) *Burrough v. Ely*, 926.

2. **COMMON-LAW LIEN.**—There is No Right of Sale of the chattel by virtue of a common-law lien thereon for work and labor performed, either at law or in equity. (W. Va.) *Burrough v. Ely*, 926.

3. **COMMON-LAW LIEN.**—A Lienor Wrongfully Deprived of his possession of the chattel on which he has performed work and labor may maintain detinue or trover. (W. Va.) *Burrough v. Ely*, 926.

4. **COMMON-LAW LIEN.**—A Suit in Equity to Sell the chattel is not authorized by a common-law lien thereon for work and labor performed. (W. Va.) *Burrough v. Ely*, 926.

See Mechanics' Liens.

Note.

Idem of judgments for alimony and the power of courts to create, 703, 705, 709.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS.**—A Defendant may Avail Himself of the defense of the statute of limitations at the trial term, by a motion to dismiss a petition which shows on its face that the cause of action is barred. (Ga.) *Davis v. Boyett*, 118.

2. **STATUTE OF LIMITATIONS.**—Mere Ignorance of the existence of facts constituting a cause of action does not prevent the running of the statute of limitations. (Ga.) *Davis v. Boyett*, 118.

3. **LIMITATION OF ACTIONS.**—Contracts not in Writing.—A statute of limitations for the commencement of actions upon a contract "or liability," express or implied, which is not in writing, refers only to contractual liabilities. (Wash.) *Suter v. Wenatchee Water Power Co.*, 881.

4. **LIMITATION OF ACTIONS.**—Trespass—Overflow of Lands.—The negligent construction of an irrigating canal, lawfully built, but without sufficiently providing for carrying off surplus water, whereby the lands of another are overflowed, does not constitute a trespass, and an action for damages caused by such flooding is not within the statute limiting actions for "trespass upon real property." (Wash.) *Suter v. Wenatchee Water Power Co.*, 881.

5. **LIMITATION OF ACTIONS.**—New Promise or Acknowledgment of Debt.—In order to remove the bar of the statute of limitations there must be either an express promise to pay or an acknowledgment of the debt accompanied by an expression of willingness to pay it, and the mere fact that a debtor "recognized the claim up to a short time before his death" is not sufficient. (Tenn.) *Warren v. Cleveland*, 749.

See Adverse Possession; Seduction.

Note.

Limitation of Actions, acknowledgment accompanied with a refusal to pay or an agreement to pay conditionally, 752, 753.

acknowledgment, difference between cases where the debt is barred and where it is not, 769.

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acknowledgment or new promise, admissions made in pleadings, whether may constitute, 760.

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- acknowledgment or new promise, illustrations of sufficient, 769-772.
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- acknowledgment or new promise, in writing, signing of, what a sufficient, 759.
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- acknowledgment or new promise must show a willingness and intention to pay, 764, 766.
- acknowledgment or new promise must specify or clearly refer to the demand, 763-765.
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- acknowledgment or new promise, suffering judgment by default is not a, 760, 761.
- acknowledgment or new promise, testamentary provisions and acknowledgments, 762.
- acknowledgment or new promise, time of making, whether material, 756.
- acknowledgment or new promise, to whom may be made, 754-756.
- acknowledgment or new promise, what words in constitute a new promise, 752.
- acknowledgment or new promise, when not such as to justify an inference of a new promise to pay, 766-768.
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- acknowledgment or new promise, wills, general directions for the payment, testator's debts do not amount to, 762.
- acknowledgment or new promise, writings which do not amount to, 772-774.
- acknowledgment or new promise, writings which may amount to, 769-772.
- acknowledgment or new promise, writings which may constitute, 759.
- acknowledgment or new promise, written is required in some of the states, 758.
- acknowledgment or new promise, written orders requiring third persons to make payment, 759.
- acknowledgment or new promise, written, sufficiency of, 764.
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Limitation of Actions, code provisions respecting the effect of an acknowledgment or new promise, 725.
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LOBBYING.

See Attorney and Client, 7.

LOGS AND LOGGING.

See Navigable Waters.

LOST INSTRUMENTS.

BANKS AND BANKING—Suit on Lost Certificate of Deposit.—Where a certificate of deposit purports to be payable to C. J. on return of the certificate "which is assignable only on the books of the company," she may, on loss of the certificate, maintain an action thereon against the company without giving any bond of indemnity, because such certificate is not negotiable and the bank could not be held liable to any assignee of such certificate of whose rights it had no notice when making payment to such person as appeared on its books to be the holder of the certificate. (N. Y.) Zander v. New York Security etc. Co., 492.

LOST PROPERTY.

See Finding Lost Property.

LOTTERIES.

MUNICIPAL CORPORATION'S Power to Suppress Lotteries. The power delegated to a city "to prevent and suppress gaming and gambling-houses, or places where any game in which chance predominates is played for anything of value," authorizes the common council to prevent the setting up or keeping of any house or place for the purpose of selling lottery tickets or certificates depending upon the event of a lottery. (Or.) Portland v. Yick, 633.

MARRIAGE.

HUSBAND AND WIFE—Validity of Marriage.—No formal ceremony is essential to the validity of a marriage. Its validity depends upon the competency of the parties to contract it. (Mich.) Supreme Tent etc. of Maccabees v. McAllister, 382.

See Adultery; Husband and Wife; Divorce.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.***In General.***

1. **MASTER AND SERVANT—Assumption of Risks.**—A person who voluntarily enters the service of another assumes all the open and obvious risks usually incident to such employment, and is presumed to have contracted with respect thereto. (Va.) *Big Stone Gap Iron Co. v. Ketron*, 839.

2. **MASTER AND SERVANT—Liability of the Former to His Servants.**—Whether a master shall be held liable when the negligent act, or omission to act, was that of one of his servants, depends usually, if not always, on the character of the act. If it is one the doing of which can be properly and justly regarded as within the personal duties of the master whose performance he has delegated to another, and not some act within the line of the mere servant's duties, then the master is properly chargeable with the result of the negligent performance or omission. (N. Y.) *Madigan v. Oceanic Steam Nav. Co.*, 495.

3. **NEGLECTENCE—Contributory—Question for Jury.**—If a plank staging is let down over the side of a vessel, and held by a rope in such manner as to allow it to tip, contrary to the customary manner of fastening such rope, whereby a servant of the owner of the vessel falls into the water and is drowned, the question of the negligence of such owner, of the contributory negligence of his servant, and of the assumption of risk by the latter, must be submitted to and determined by the jury. (Mich.) *Rick v. Saginaw Bay Towing Co.*, 422.

4. **MASTER AND SERVANT—Negligence.**—If a freight-car conductor, before starting his train, tests the brakes at each end of the cars in the usual and customary way, by setting them up and releasing them, and they work properly, and he is shortly after injured through the breaking of a brake chain containing a concealed defect, which it is the duty of the car inspector of the railroad company to keep in good repair, such car conductor is not guilty of negligence, nor has he violated a rule of the company requiring him to know that there are reliable brakes on his cars. (Mich.) *McDonald v. Michigan Cent. R. R. Co.*, 426.

5. **RAILWAY EMPLOYÉ—Injury from Violation of Law.**—A railway engineer cannot recover for injuries received in a collision proximately caused by his violation of a statute requiring the speed of trains to be checked at crossings, or by his violation of an ordinance limiting the speed of trains, although the railway company may have commanded him to disobey the law, or there had been such repeated disobedience as to amount to a custom. (Ga.) *Little v. Southern Ry. Co.*, 104.

6. **RAILWAY EMPLOYÉ—Knowledge of Rules.**—A railway employé is not bound by any rule of the company of which he has no knowledge; but if he is furnished an opportunity to learn the rules, and by the exercise of ordinary care can acquaint himself with them, this amounts to knowledge. (Ga.) *Little v. Southern Ry. Co.*, 104.

7. **RAILWAY EMPLOYÉ—Contributory Negligence.**—If the negligence of a railway employé appreciably contributes to his injury, his right of recovery is thereby defeated. (Ga.) *Little v. Southern Ry. Co.*, 104.

Employment of Surgeon.

8. **MASTER AND SERVANT—Employment of Surgeon.**—If the master assumes to employ a surgeon to treat his servants, he must

exercise reasonable care in his selection, but the presumption is that this duty has been performed. (Va.) *Big Stone Gap Iron Co. v. Ketron*, 839.

9. **MASTER AND SERVANT—Employment of Surgeon.**—In order to hold a master liable for the incompetency of a surgeon selected by him to treat his employes, the incompetency of the surgeon must be proved, and there must be evidence of a want of reasonable care on the part of the master in his selection, or actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice had he exercised due oversight and supervision. (Va.) *Big Stone Gap Iron Co. v. Ketron*, 839.

Fellow-servants.

10. **MASTER AND SERVANT—Fellow-servants, Employes of Different Persons, When are.**—If a master lends or hires his servant to another to do work for the latter and under his direction, such servant becomes a fellow-servant with the servants of the person to whom he is thus lent or hired, and cannot recover of their master if injured through their negligence. The test is whether, in the particular service which he is engaged to perform, he continues liable to the control and direction of his master, or becomes subject to that of the party to whom he is lent or hired. (Mass.) *Delory v. Blodgett*, 328.

11. **MASTER AND SERVANT—Employment of Incompetent Servants, When not Established.**—Testimony that an engineer had been known to drink intoxicating liquor does not tend to prove that his employers were negligent in employing him. (Mass.) *Delory v. Blodgett*, 328.

12. **MASTER AND SERVANT—Duty Resting on Foreman as Fellow-servant.**—If a coal foreman in charge of a gang of stevedores errs in his judgment of the necessity for lighting a lamp, whereby an injury results to one of them, the error respects a duty resting on the foreman as a fellow-servant, and the master is not liable. (N. Y.) *Madigan v. Oceanic Steam Nav. Co.*, 495.

13. **NEGLIGENCE—Fellow-servants.**—If the mate of a vessel gives general directions for the doing of work thereon, and a fellow-servant is injured through his misuse of the material provided, the owner of the vessel is liable, if the evidence shows that it was the duty of the mate to attend to any work he ordered done, and to see that it was done himself, and that he was hired for that purpose. (Mich.) *Rick v. Saginaw Bay Towing Co.*, 422.

14. **MASTER AND SERVANT—Fellow-servants.**—A railroad car inspector and a freight-car conductor are not fellow-servants. (Mich.) *McDonald v. Michigan Cent. R. R. Co.*, 426.

15. **MASTER AND SERVANT—Fellow-servants.**—Those employed by the master to provide, or to keep in repair, the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to one another fellow-servants. In such case the one whose duty it is to provide and look out for the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence. (Mich.) *McDonald v. Michigan Cent. R. R. Co.*, 426.

16. **FELLOW-SERVANTS—Negligence.**—An Employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking. (Ind.) *Indianapolis etc. Transit Co. v. Foreman*, 185.

17. FELLOW-SERVANTS—Railway Employé Riding Home.—An employé engaged in common labor on the track of an interurban railway is, while being transported to and from his work, a fellow-servant with those in charge of the passenger-car in which he rides. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

18. FELLOW-SERVANTS—Negligence—Pleading.—Allegations in the complaint, in an action by a railway employé for injuries sustained while being transported from work, which are mere conclusions of the pleader, cannot control special facts alleged which show that the plaintiff was a fellow-servant with those in charge of the car. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

19. FELLOW-SERVANT—Knowledge of Incompetency—Pleading.—In an action for injuries sustained through the negligence of a fellow-servant, the complaint is insufficient if it fails to negative the plaintiff's knowledge of the fellow-servant's incompetency; and an allegation that the plaintiff was injured without fault or negligence on his part does not take the place of averments showing that the risk of such incompetency was not knowingly assumed. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

20. FELLOW-SERVANTS—Statutory Liability.—Under the second subdivision of the Indiana employers' liability act, it is necessary, in order to make a good complaint against a railway corporation for the negligence of a coemployé, to allege that the complaining employé was, when injured, conforming to the order or direction of some person in the service to whose order or direction he was bound to conform. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

21. FELLOW-SERVANTS—Switch Tender—Statutory Liability.—The fourth subdivision of the Indiana employers' liability act creates no liability for injuries to a railway employé caused by the negligence of persons in charge of a switch. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

22. FELLOW-SERVANTS—Knowledge of Incompetency—Pleading.—In an action for injuries sustained through the negligence of a fellow-servant, the averments of want of knowledge on the part of the employé of the coemployé's incompetence must be as broad as the allegation of knowledge on the part of the employer. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

23. FELLOW-SERVANTS—Implied Knowledge of Incompetency.—Implied knowledge of a fellow-servant's incompetency, such as could have been acquired by the exercise of ordinary care, has the same force and effect, in barring a recovery for injuries sustained by an employé, as actual knowledge. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

MECHANICS' LIENS.

MECHANIC'S LIEN—Separate Buildings.—Where a contractor agrees, under a separate contract for each building, to erect several houses, a subcontractor furnishing material and labor for them under an entire contract cannot file a single lien against all the buildings. (Or.) Beach v. Stamper, 597.

MERCANTILE AGENCY.

See Sales, 1.

MERGER.

See Mortgages, 1.

Note.

Mills, eminent domain, exercise of power of in behalf of, 819.

MINES AND MINERALS.

1. **MINES AND MINING—Relocation of Claim.**—The mere cancellation of an entry of a mining location does not render the ground open to relocation. (Colo.) Rebecca Gold Min. Co. v. Bryant, 17.

2. **MINES AND MINING—Conflicting Locations.**—If the original locators of a mining claim relinquish it to a junior locator so that the latter may acquire title to it, and he, before intervening rights accrue, takes such steps under the public land laws and the rules of the land department as entitle him to a patent, and on final proof he receives a receiver's receipt, a third person cannot gain a superior right by making a location upon the claim as unappropriated public domain, after the issuance of a certificate of purchase, unless it and the receiver's receipt are legally canceled. (Colo.) Rebecca Gold Min. Co. v. Bryant, 17.

3. **MINES AND MINING—Conflicting Locations—Vested Rights Under Certificate of Purchase.**—If a strip of land between two mining locations is included and described in the location certificate of one of the locators, but when application for a patent is made by him is excluded from his location, and by agreement of the two locators intended to be included in the other locator's claim, the owner of which amends his papers and upon final proof made includes such strip, which is included in the final certificate of purchase to him issued by the land department, but afterward the land commissioner, without notice to such locator, changes the records of his office so as to exclude such strip, and the patent, when issued, does not cover it, and a third person thereafter locates it as another claim while it is in the possession of the holder of the certificate of purchase, under claim of ownership, the attempted cancellation of such certificate of purchase by the land department is void and the holder of such certificate has a vested right to a patent to such strip as against the last locator. (Colo.) Rebecca Gold Min. Co. v. Bryant, 17.

4. **MINES AND MINING—Extralateral Rights.**—For all veins, both discovery and secondary, of a patented mining claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines, and such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists, and while the end lines of the location of the claim, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. (Colo.) Ajax Gold Min. Co. v. Hilkey, 23.

Note.

Mines and Minerals, agreement to discover and locate for the benefit of another, whether within the statute of frauds, 233.
notice to co-owner directed to a deceased person, 683, 684.

Mines and Minerals, notice to co-owner may include claims for more than one year's expenditures, 685.

notice to co-owner need not name the heirs of a deceased owner, 684.

notice to co-owner, publication of, what sufficient, 685.

notice to co-owner to contribute his share of the expenses need not be directed to anyone by name, 683.

MORTGAGES.

1. **MORTGAGES—Merger.—Contract Against** merger and satisfaction of a mortgage by conveyance to the mortgagee need not necessarily be in writing and inserted in the conveyance. It may rest in parol. (S. C.) Glenn v. Rudd, 659.

2. **MORTGAGE—Suit to Redeem from.**—A complaint by a mortgagor averring that the note secured by the mortgage was in part for usurious interest, that part payment had been made, and that a tender of more than was due had been refused, and praying the court to decree a satisfaction of the note and mortgage, and to decree, if the tender should be found insufficient, the amount due, which the plaintiff offers to pay, sufficiently shows a cause of action for redemption by the mortgagor. (Ind. App.) Bowen v. Gerhold, 257.

3. **MORTGAGE—Suit to Redeem from—Tender.**—In a suit to redeem from a mortgage, it is not necessary that the complaint should show a strict legal tender, kept good by bringing the money into court; an offer in the complaint to pay the amount found due is sufficient. (Ind. App.) Bowen v. Gerhold, 257.

MUNICIPAL CORPORATIONS.

Ordinances.

See Evidence, 5.

1. **ORDINANCES—Adoption of—Impeachment by Courts.**—If a municipal ordinance is to be impeached or overthrown because irregularly adopted, it must appear affirmatively from the journals of the common council that the mandatory provisions of the city charter relative to the passage of the ordinance have not been observed; and mere silence of the records does not amount to such a showing. (Or.) Portland v. Yick, 633.

2. **ORDINANCES—Adoption of—Records of Council.**—When the regularity of the passage of a city ordinance is questioned, courts will not look into minor records which the council may require kept, to determine whether the rules which it has adopted for the orderly dispatch of business have been complied with. (Or.) Portland v. Yick, 633.

3. **ORDINANCES—Regularity of Adoption.**—A Method adopted by a city council of keeping a record of the suspension of rules and the passage of an ordinance, by attaching to the ordinance slips containing the yeas and nays, will not be questioned by the courts. (Or.) Portland v. Yick, 633.

4. **ORDINANCE.**—Neither the Signing nor the Attestation of an ordinance by the city auditor is essential to its validity under the charter of Portland. (Or.) Portland v. Yick, 633.

Streets.

5. **PUBLIC STREET—Abandonment by City.**—While Prescription does not run against a municipal corporation with respect to land held for a public use, yet it may, by voluntary abandonment, re-

linquish its control over streets dedicated to it for the use of the public. (Ga.) *Kelsoe v. Town of Oglethorpe*, 138.

6. PUBLIC STREET—Abandonment by City through Nonuser.—The abandonment of a public street by a municipal corporation may be inferred from a nonuser thereof for a period of forty years. (Ga.) *Kelsoe v. Town of Oglethorpe*, 138.

7. MUNICIPAL CORPORATIONS—Use of Streets—House Moving—Telephone Line.—A licensed house mover in a city is liable for an injury done by him, while moving a house, to the wires and property of a telephone company authorized by ordinance to establish and maintain a telephone line and system in the streets of such city. (N. Dak.) *Northwestern Tel. etc. Co. v. Anderson*, 580.

8. MUNICIPAL CORPORATIONS—Use of Streets.—House moving in a street is an extraordinary use thereof, and while it may be permitted, it cannot be allowed so as to destroy the use of the street for the purpose of travel or other necessary public purpose, or to destroy or impair vested rights. (N. Dak.) *Northwestern Tel. etc. Co. v. Anderson*, 580.

Pesthouse.

9. MUNICIPAL CORPORATIONS—Pesthouse as Proximate Cause of Spread of Smallpox.—If the location of a pesthouse is such as to render the city liable for smallpox communicated by the pesthouse to the members of a family living near by, it is also liable to a guest of such family who contracted the disease therefrom while visiting there without knowledge of the infection at the pesthouse or in the family. The location of the pesthouse is the proximate cause of the injury to such guest. (Ky.) *City of Henderson v. O'Halaran*, 279.

10. MUNICIPAL CORPORATIONS—Negligent Spread of Smallpox—Contributory Negligence.—If the location of a pesthouse is such as to make a city liable for smallpox contracted by a guest without his fault, while visiting with a family residing in the vicinity of such pesthouse, the fact that the guest while on such visit slept with a child infected with such disease, but unknown to him or the family, does not render him guilty of contributory negligence so as to bar his right to recover of such city. (Ky.) *City of Henderson v. O'Halaran*, 279.

See Dedication; Replevin.

MURDER.

See Homicide.

NAVIGABLE WATERS.

1. NAVIGABLE STREAMS—What are.—A stream which in its natural state can be practically used for the floatage of shingle bolts to market at certain times and seasons annually is a navigable stream, which may be used for such purpose across the lands of a lower riparian proprietor and any interference with such use may be enjoined. (Wash.) *Monroe Mill Co. v. Menzel*, 905.

2. NAVIGABLE STREAMS—Riparian Rights—Detention and Release of Water Overflow—Injunction.—Maintaining a dam in, and detaining the water of, a navigable stream, and the release of such water at irregular intervals, causing an overflow of the lands of a lower owner, and obstructing his navigation of the stream, are such interferences with the natural flow of the water as entitle such

lower proprietor to an injunction against the maintenance of such dam. (Wash.) *Monroe Mill Co. v. Menzel*, 905.

3. NAVIGABLE STREAMS—Riparian Rights—Unmeandered Streams.—One who uses an unmeandered navigable stream for floating timber must confine himself and his operations to the bed of such stream, and has no right to go upon the banks of the stream in front of land of riparian owners, without their consent, or unless such right has been acquired in a lawful way. (Wash.) *Monroe Mill Co. v. Menzel*, 905.

4. NAVIGABLE STREAMS—Riparian Rights—Estoppel.—If a person has cleared a navigable stream across the land of another of obstructions in order to facilitate the movement of floating lumber, the facts that such land owner has acquiesced therein for two years without objection, has actually assisted in cleaning out such obstructions, thereafter used the benefit accruing therefrom, and has also used the flow of the water as furnished by such improvements, do not estop him from claiming an interference with the natural flow of the water. (Wash.) *Monroe Mill Co. v. Menzel*, 905.

5. WATERS—Navigable—Ownership of Lands Under.—Navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by it within its discretion for the benefit of the people, and the only limitation upon such power is that the state cannot interfere with the authority of the national government in regulating commerce and navigation. (Va.) *Taylor v. Commonwealth*, 865.

6. WATERS—Navigable—Ownership of Land Under—Riparian Rights.—The fee simple title of a riparian owner on a navigable stream ends with ordinary low-water mark, but between that point and the line of navigability, he has certain qualified rights, among them being the right of access to the navigable part of the stream from the front of his land, the right to build wharves or piers, for his own use or the use of the public, and such other rights as may be granted him by statute, subject to legislative regulation for the protection of the public, and its rights. Such riparian rights are property and must be protected as such. (Va.) *Taylor v. Commonwealth*, 865.

7. WATERS—Navigable—Exercise of Riparian Rights.—Riparian rights possessed by an owner between ordinary low-water mark and the point of navigability, and the rights of the state in the ownership of the soil, must be exercised, if possible, so that the one shall not necessarily disturb or impair the enjoyment of the other. (Va.) *Taylor v. Commonwealth*, 865.

8. WATERS—Navigable—Riparian Rights—State Rights.—A riparian owner who is not disturbed in an existing or contemplated riparian right cannot complain because the state leases to another a portion of the bed of a navigable stream in front of such owner, but beyond ordinary low-water mark, for the purpose of sinking a well and using the water therefrom. (Va.) *Taylor v. Commonwealth*, 865.

9. WATERS—Navigable—Ownership of Soil Under and Rights Therein.—The navigable waters and the soil under them and whatever it contains, beyond ordinary low-water mark, and within the territorial limits of the state, belong to the state, which alone has the right to develop any hidden sources of wealth therein for the common benefit of all of its citizens. (Va.) *Taylor v. Commonwealth*, 865.

10. WATERS—Navigable—Exercise of Riparian Rights.—A riparian owner on a navigable stream will not be permitted capriciously and arbitrarily to exercise a riparian right in a manner most injurious to others, and not more beneficial to himself, but he will be required to exercise such right in a manner least injurious to others, if that end can be accomplished without a wrong to him. (Va.) *Taylor v. Commonwealth*, 865.

11. WATERS—Navigable—Ownership of Land Under.—Riparian Owners on a navigable stream have no title as owners to the water between low-water mark and the channel of the stream, nor to the soil beneath it, nor to what such soil contains. The ownership of such water and soil and its contents is in the state. (Va.) *Taylor v. Commonwealth*, 865.

See Nuisance.

NEGLIGENCE.

1. NEGLIGENCE.—The Proximate Cause is not always that which is nearest in time or place to the injury. The meaning of the maxim, "*Causa proxima non remota spectatur*," is that the true cause of an injury is that which brings it about, either by direct operation or by setting in motion other causes as instruments or agents operating under its dominant influence. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

2. NEGLIGENCE.—The Proximate Cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to the controlling or principal cause. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

See Conflict of Laws; Gas.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. NEW TRIAL—Failure of Judge to Exercise Discretion.—When a first application for a new trial is made partly on the ground that the verdict is contrary to the evidence, and the judge overrules the motion without exercising the discretion which the law contemplates he shall, the judgment must be reversed, unless the verdict is demanded by the evidence. (Ga.) *McIntyre v. McIntyre*, 71.

2. NEW TRIAL—Overruling Motion for—Exceptions.—When a motion for a new trial is based partly on discretionary grounds, the failure of the judge, in overruling the motion, to exercise his discretion, may be raised by a general exception. (Ga.) *McIntyre v. McIntyre*, 71.

3. NEW TRIAL—Decision of the Trial Court on Motion for, When Conclusive.—If there is a motion for a new trial on the claim that one of the jurors testified falsely on his voir dire as to the fact of his having previously formed an opinion respecting the defendant's guilt, and the evidence, on the hearing of the motion, is conflicting as to the existence of such ground, a question of fact is thereby presented for consideration, the decision of which by the trial court is conclusive, unless it satisfactorily appears by the record to be against the clear preponderance of the evidence. (Wis.) *Cupps v. State*, 996.

NOTICE.

1. **NOTICE—Publication of—Sufficiency of as to Time.**—Publication every day except Sunday in a proper newspaper, beginning Monday, January 7th, and ending Tuesday, April 2d, fulfills the requirement of a statute for giving notice by publication, "for at least once a week for ninety days." (S. Dak.) *Elder v. Horseshoe Min. etc. Co.*, 681.

2. **NOTICE.**—Publication of Notice "for at least once a week for ninety days" includes the first day of publication. (S. Dak.) *Elder v. Horseshoe Min. etc. Co.*, 681.

3. **NOTICE—Publication of—Time of, How Computed.**—Under a statute requiring publication of notice "for at least once a week for ninety days," the first and each succeeding publication includes the first day thereof and the six days following, and this must be taken into consideration in computing the required ninety days of publication. (S. Dak.) *Elder v. Horseshoe Min. etc. Co.*, 681.

Note.

Notice, publication of, computing time for, 685.

NUISANCE.

1. **NUISANCE, PUBLIC—Individual Remedy.**—If a public nuisance causes unusual and special damage to an individual as contradistinguished from a grievance common to the public, he may bring a civil action for the redress of the injury. (N. C.) *Reyburn v. Sawyer*, 555.

2. **NUISANCE, PUBLIC—Injunction.**—A person who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action for damages alone, but may also sue for and obtain an injunction. (N. C.) *Reyburn v. Sawyer*, 555.

3. **NUISANCE, PUBLIC—Injunction—Insolvency.**—A court of equity may, in its discretion, grant an injunction to prevent a special injury to a private person from the erection or maintenance of a public nuisance, when there can be no other redress on account of the defendant's insolvency. (N. C.) *Reyburn v. Sawyer*, 555.

4. **NUISANCE—Fish Nets in Navigable Waters.**—If fish nets are set in a permanent manner by means of stakes driven in the soil of navigable waters so as to interfere with navigation, they constitute a public nuisance. (N. C.) *Reyburn v. Sawyer*, 555.

5. **NUISANCE, PUBLIC—Injunction—Fish Nets in Navigable Waters.**—The owner of property is entitled to an injunction to compel the removal of set fish nets in the adjoining navigable waters, when such nets constitute a public nuisance and are of special injury to such owner in interfering with his access to his property, and when the person setting the nets is insolvent and unable to respond in damages. (N. C.) *Reyburn v. Sawyer*, 555.

OFFICERS.

1. **PRINCIPAL AND SURETY—Knowledge by Obligees of Bond of Past Irregularities of Principal.**—If it is known to the obligee in a bond that the principal has in the past been guilty of irregularities in respect of the duties for the faithful performance of which in the future the bond is given, the failure of the obligee to disclose

that act is a defense to the liability of the surety. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

2. PRINCIPAL AND SURETY—Knowledge of the Obligees, When not Sufficient to Release the Surety.—Knowledge on the part of an obligee in the bond of a collector of taxes which does not arise upon hearsay or rumors, and "that there was a woman mixed up in the case," is not sufficient to release the sureties on the bond, though not communicated to them by such obligee. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

3. OFFICIAL BOND—Liability for Moneys Previously Received. Where a bond given by a collector of taxes is for the faithful discharge of his duties for his whole term, his sureties are liable for moneys previously received during that term, but before the bond was executed. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

4. OFFICIAL BOND, When Good as a Common-law Obligation.—Though a tax collector has given a bond, which has been approved by the selectmen, and their power to accept and approve bonds for that year is exhausted, yet a bond subsequently given by such collector may be good as a common-law bond. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

5. OFFICIAL BONDS—Statements Made to Sureties, but not Communicated to Obligees.—Statements made by a tax collector to induce persons to become sureties on his official bond, are not available in defense of such sureties when the statements were made without the knowledge of the obligee. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

6. OFFICIAL BONDS.—Negligence on the Part of the Selectmen and Other Officers of a Town in failing to make an investigation which would have discovered the misconduct of a tax collector and their failure to insist on his keeping certain books does not constitute any defense to his sureties. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

7. OFFICIAL BONDS, Liability of Sureties for Moneys Used to Pay Defalcations of a Previous Term.—If a collector of taxes who holds office for two terms, with different sureties on his official bonds, applies sums received for taxes during his second term to the payment of taxes due during the first term, which had been collected by him and not paid over, the sureties on his bond for the second term are liable, if the sums so paid were received in good faith by the town. (Mass.) Inhabitants of *Hudson v. Miles*, 370.

ORDINANCES.

See Evidence, 5; Municipal Corporations, 1-4.

PARENT AND CHILD.

1. PARENT AND CHILD—Child's Right to Damages for Corporal Punishment.—The right of a parent to control his infant child includes the right to inflict moderate chastisement upon it, without civil liability in damages therefor. If the child has any redress in such case, it is to be found in the criminal law, and in the remedy afforded by the writ of habeas corpus. (Tenn.) *McKelvey v. McKelvey*, 787.

2. PARENT AND CHILD—Damages for Cruel Treatment of Parent.—A child has no right to recover damages against his father and stepmother for cruel and inhuman treatment inflicted by the step-

mother with the consent of the father. (Tenn.) *McKelvey v. McKelvey*, 787.

See Bills and Notes, 6; Infants.

PARKS.

See Dedication.

PARTITION.

1. **PARTITION—Parties.**—A Trustee and a Creditor are not necessary parties in a partition suit, unless a sale is asked. (W. Va.) *Waldron v. Harvey*, 959.

2. **COTENANCY—Partitition—Possession.**—Under a statute providing that one or more of several cotenants holding and being in possession of real property may bring suit for partition, it is absolutely essential, to maintain such suit, that the defendant shall be in possession of the property sought to be partitioned as a cotenant with the plaintiff. (S. Dak.) *Wells v. Sweeney*, 712.

3. **PARTITION.**—A Decree in Partition Disposing of everything involved in the suit is final, and puts the case out of court, and after the term the powers of the court are closed. (W. Va.) *Waldron v. Harvey*, 959.

4. **PARTITION—Sale for Costs.**—In a Suit Purely and Only for Partition, there can be no sale except for the reason that the land is indivisible; a sale for costs is void. (W. Va.) *Waldron v. Harvey*, 959.

See Homestead, 7, 8.

PARTNERSHIP.

Unlawful Purpose.

1. **PARTNERSHIP in Unlawful Acts.**—If two persons are jointly engaged in maintaining an illegal lottery, and one contributes money to the other with bribe public officials in order to secure immunity from prosecution, such persons are partners and one is not the agent of the other. (Ky.) *Smith v. Richmond*, 283.

2. **PARTNERSHIP in Unlawful Acts—Accounting.**—One partner is not entitled to an accounting from the other for money invested in an unlawful purpose, such as maintaining an illegal lottery, especially if such purpose is to violate the criminal laws of the state, and shield offenders from punishment, or to corrupt public officers. (Ky.) *Smith v. Richmond*, 283.

Retiring Partner.

3. **PARTNERSHIP—Retiring Partner a Surety as Between the Partners.**—When one partner retires from a firm, and the continuing partner agrees to assume the firm debts, the retiring partner, as between himself and his copartner, becomes merely a surety for the continuing partner upon the debts of the firm. (Ga.) *Preston v. Garrard*, 124.

4. **PARTNERSHIP—Retiring Partner a Surety as to Creditors.**—Mere notice to a creditor of the retirement of one partner, and of an agreement by the continuing partner to assume the firm debts, requires him to treat the retiring partner as a surety for the continuing partner; and if he extends the time of payment of his debt without the retiring partner's knowledge, the latter is released. The notice, however, must be actual. (Ga.) *Preston v. Garrard*, 124.

Suits and Accounting.

5. **PARTNERSHIP, Equity Jurisdiction Over.**—The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, nor except with a view to dissolve the corporation and, by a final decree, to adjust its affairs. (N. Y.) Lord v. Hull, 484.

6. **PARTNERSHIP.—A Suit by One Partner Against Another** will not be Sustained where there is no dissolution of the firm and no occasion for its dissolution, and the only matter of difference between them respects the existence and validity of a contract with a third person and the right to apply certain moneys in accordance with the terms of such contract. (N. Y.) Lord v. Hull, 484.

7. **PARTNERSHIP.—A Court of Equity will not Take Cognizance of a Suit for an Accounting** as a mere incident to a settlement of a solitary matter in dispute between partners, when it is not vital to either party nor to the business, and a dissolution is not sought. (N. Y.) Lord v. Hull, 484.

8. **PARTNERSHIP—Intrusion of a Third Party in a Suit for an Accounting.**—Where a suit for an accounting is brought by one partner against another because they differ as to the claims of a third person upon the firm under a contract between him and it, he has an adequate remedy at law and cannot gain anything by being made a party defendant and setting up his claims. The suit, not being maintainable as between the parties, must be dismissed, both as to them and as to the third person. (N. Y.) Lord v. Hull, 484.

See Attorney and Client.

Note.

Partnership in lands, whether within the statute of frauds, 239.

PENALTY.

IF A PENALTY is Prescribed by an Ordinance for the doing of an act, this is notice of the unlawful character of the act, although it is not expressly declared to be a crime or to be unlawful. (Or.) Portland v. Yick, 633.

PESTHOUSE.

See Municipal Corporations, 9, 10.

PHYSICAL EXAMINATION.

See Damages, 1, 2.

PHYSICIANS AND SURGEONS.

See Master and Servant, 8, 9.

PLEADING.*In General.*

1. **PLEADING.**—Facts, not Conclusions, must be averred; and they must be pleaded directly and positively, and not by way of recital. (Ind.) Indianapolis etc. Transit Co. v. Foreman, 185.

2. **PLEADINGS—Inconsistency—Evidence.**—An allegation in a complaint that a stream is navigable for shingle bolts is not negatived by a subsequent averment that plaintiff had constructed a dam to

furnish a sufficient supply of water in such stream to conveniently and rapidly float shingle bolts and other timber. Evidence is admissible to support such a complaint. (Wash.) *Monroe Mill Co. v. Menzel*, 905.

3. **PLEADING.—A Variance Between the Writ and the Declaration** can be taken advantage of only by a plea in abatement, and it cannot be filed until the writ is made a part of the record by demanding oyer thereof. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

4. **PLEADING AND PROOF—Variance.**—If, in an action on a note, defendant sets up in an amended answer a counterclaim based upon breach of contract, but the contract proved is different from the one alleged in the answer, it is not error to direct a verdict for plaintiff, if no request is made to amend the answer to correspond with the proof, although defendant, before testifying, has tendered a second amended answer which has been denied, for want of a proper showing made, in which the contract is alleged in accordance with the proof. (Colo.) *Winchester v. Joslyn*, 30.

Judgment and Relief.

5. **PLEADING.—A Decree Which has No Matter in the pleading to rest upon is void.** (W. Va.) *Waldron v. Harvey*, 959.

6. **PLEADING.—In a Suit for One Purpose there can be no decree for another.** (W. Va.) *Waldron v. Harvey*, 959.

7. **PLEADING.—Under a Prayer for General Relief, relief not specially asked for may be had, if the facts alleged and the nature of the case warrant it, but not otherwise.** (W. Va.) *Waldron v. Harvey*, 959.

PLEDGES.

1. **PLEDGES—Unauthorized Sale—Conversion.**—If collateral security is sold without authority and purchased by the pledgee, he is not guilty of conversion and the pledgor may either ratify or disaffirm the sale. If he disaffirms it the property remains in the hands of the pledgee as security, subject to the right of the pledgor to redeem by payment of the debt, but if the pledgee, by an unauthorized sale, puts it out of his power to restore the pledged property, he is liable for the amount of the value thereof to the pledgor. (Colo.) *Winchester v. Joslyn*, 30.

2. **PLEDGES—Unauthorized Sale—Fraud.**—The fact that a pledgee of collateral security purchases it at an unauthorized sale at a grossly inadequate price does not entitle the pledgor, in an action by the pledgee on the principal debt, to have the issue of fraud in the purchase of the collateral determined, if there is no allegation of fraud in the answer. (Colo.) *Winchester v. Joslyn*, 30.

3. **PLEDGES—Unauthorized Sale—Conversion.**—If a pledgee purchases collateral security at an unauthorized sale, the fact that he asserts absolute ownership does not constitute a conversion. (Colo.) *Winchester v. Joslyn*, 30.

POWER OF ATTORNEY.

See United States.

PRINCIPAL AND AGENT.

AGENCY.—Evidence of the fact that a person is purchasing agent for others than his partnership is not competent to prove that in a particular instance he acted for his firm, if the seller has no

notice that he is purchasing agent for such others. (S. C.) *Huganot Mills v. Jempson & Co.*, 673.

See Factors.

PRINCIPAL AND SURETY.

See Attachment, 4, 5; Officers.

PROBATE PROCEEDINGS.

See Executors and Administrators.

PROCESS.

1. **SUMMONS—Who may Serve.**—The agent of a corporation or other party plaintiff to an action is not a "party," within the meaning of a statute authorizing service of summons by the sheriff or any other person not a party to the action, and such service may therefore be legally made by such agent. (S. Dak.) *Plano Mfg. Co. v. Murphy*, 692.

2. **SUMMONS—Service—Mistake of Law.**—An opinion entertained by a defendant that no one but an officer could make a valid service of summons upon him in a civil action is a mistake of law and not of fact, from which the defendant is not entitled to relief, on the ground of his mistake or excusable neglect. (S. Dak.) *Plano Mfg. Co. v. Murphy*, 692.

See Corporations, 20-22; Infants; Insurance, 1-3; Notice.

PROTEST.

See Bills and Notes, 10-12.

PROXIMATE CAUSE.

See Negligence.

PUBLICATION.

See Notice.

PUBLIC OFFICERS.

See Officers.

Note.

Public Use. See Eminent Domain.

QUIETING TITLE.

CLOUD ON TITLE.—One in Possession of Land may sue in equity to have a cloud on the title, arising from a void partition decree and sale, removed. (W. Va.) *Waldron v. Harvey*, 959.

RAILROADS.

Right of Way.

1. **CONVEYANCES—Grant with Condition Subsequent—Breach of—Ejectment.**—If an owner conveys land to a railroad company for

a right of way upon express condition contained in the deed, that if the grantee fails to erect and maintain a depot at a point named in the deed, the land shall revert to the grantor, upon the failure of the grantee to maintain the depot, the title and right of possession revert, as the provision in the deed is a condition subsequent and not a covenant, and not being restrictive as to the erection of depots at other points, is not void as against public policy. Hence, the grantor is not estopped from maintaining an action in the nature of ejectment against the railroad company. (N. Dak.) *Griswold v. Minneapolis etc. Ry. Co.*, 572.

2. **EJECTMENT Against Railroad Company—Stay of Execution of Judgment.**—If the immediate execution of a judgment in ejectment against a railroad company from its right of way will work a hardship upon it, a court of equity may enjoin the proceedings to oust it from land upon which it has in good faith constructed its road until it shall have an opportunity to acquire title by condemnation proceedings. (N. Dak.) *Griswold v. Minneapolis etc. R. R. Co.*, 572.

Trespassers.

3. **RAILWAYS.**—To a Trespasser on Its Cars a railroad company owes no duty except to refrain from willfully or wantonly and recklessly exposing him to danger. This rule is not rendered inapplicable by the doing of something directed to the trespasser and intended to affect immediately his conduct or condition, if the thing done is in the exercise of the legal rights of the railway company. (Mass.) *Bjornquist v. Boston etc. R. R. Co.*, 332.

4. **RAILWAYS.**—A Railway Corporation may Exercise Force Toward a Trespasser on Its Cars, if the force is limited to that which is reasonable under the circumstances, and is kept within the legal rights of the railway company. (Mass.) *Bjornquist v. Boston etc. R. R. Co.*, 332.

5. **RAILWAYS.**—Duty Toward Trespasser of Brakeman in Charge of Train.—If a brakeman is in charge of cars, it is his duty to do all that he reasonably can to keep trespassers away from them. He may, from the necessity of the case, appeal to them in some form, and in some degree to fear as a motive to induce obedience to proper rules. (Mass.) *Bjornquist v. Boston etc. R. R. Co.*, 332.

6. **RAILWAYS.** Liability of, for Injuries Due to Threat of Brakeman.—If a brakeman, finding boys stealing a ride on the cars of his employer, says to them, "Get out of there, or I will break your neck," and one of the boys thereupon jumps, and, in jumping, slips and falls under the wheels, and is injured, what the brakeman did and said does not constitute such reckless and wanton negligence as to render his employer answerable to the boy thus injured, though he was only eight and a quarter years of age. (Mass.) *Bjornquist v. Boston etc. R. R. Co.*, 332.

7. **RAILWAYS.**—Trespassers, Duty to Search Cars for.—A railway company is not required to search for trespassers on cars standing on a sidetrack before moving them. (Ind.) *Jordan v. Grand Rapids etc. Ry. Co.*, 217.

8. **RAILWAYS.**—Trespasser.—To Render a Railway Company Liable to a trespasser, it must have knowledge of his situation in time to prevent the injury, or it must inflict the injury purposely or recklessly. (Ind.) *Jordan v. Grand Rapids etc. Ry. Co.*, 217.

9. **RAILWAYS.**—Infant Trespasser on Cars.—A boy of eight years of age who, without invitation or permission, climbs upon a box-car

standing on a sidetrack to watch a sale of horses in the stockyards near by is a trespasser. (Ind.) *Jordan v. Grand Rapids Ry. Co.*, 217.

10. **RAILWAYS—Trespasser—Evidence of Invitation.**—In an action for the death of a boy where he climbed upon cars standing on a sidetrack to watch a sale of horses in the railway company's stockyards, evidence of a sale there on a former occasion which attracted people to the vicinity is not admissible. (Ind.) *Jordan v. Grand Rapids etc. Ry. Co.*, 217.

See Carriers; Master and Servant; Street Railroads.

Note.

Railroads, eminent domain, in favor of what power of may be invoked, 822, 823.

Reclamation of Lands, eminent domain, power of may be invoked in behalf of, 832.

RECORDS.

See Deeds, 2; Vendor and Vendee, 2.

RELEASE.

See Torts, 2.

REPLEVIN.

1. **REPLEVIN Lies Only Against the Person in Possession of the property**; it is a mere possessory action. (Or.) *Jenkins v. Ontario*, 625.

2. **REPLEVIN for a Dog Impounded by a City Marshal and in his possession must be brought against him and not against the municipality.** (Or.) *Jenkins v. Ontario*, 625.

RES GESTAE.

See Evidence, 6, 7.

RIPARIAN RIGHTS.

See Navigable Waters; Waters and Watercourses.

ROBBERY.

ROBBERY—Variance Between Pleading and Proof.—If an indictment for robbery charges that the money taken was the property of a certain named individual, proof that it belonged to a partnership of which he was a member and that it was in his immediate and exclusive control does not constitute a fatal variance. (Wash.) *State v. Fair*, 897.

SALES.

In General.

1. **SALES on Credit—Report of Commercial Agency.**—A purchaser of goods on credit cannot be compelled to anticipate payments simply because the seller has received unsatisfactory reports from a commercial agency as to the financial standing of the purchaser. (Mich.) *Kavanaugh Mfg. Co. v. Rosen*, 378.

2. CONDITIONAL SALE—Loss of Property, Who Must Bear.—

If, on a conditional sale, by the terms of which payment is to be made in installments, and the title to remain in the vendor until payment is made, the property is destroyed by fire without the fault of the purchaser, he is no longer under obligation to make payment. The risk of the loss and destruction, where neither party is at fault, is upon a vendor who retains title. (Mass.) *Tabbut v. American Ins. Co.*, 353.

Damages for Breach of Contract.

3. SALES on Credit—Breach of Contract.—A seller, who, after receiving an order for goods to be sold on credit, ships part of them to the purchaser, but refuses to send him the remainder, because of receiving an unfavorable report of his financial standing from a commercial agency, is liable in damages for breach of contract. (Mich.) *Kavanaugh Mfg. Co. v. Rosen*, 378.

4. SALES.—Measure of Damages for Failure to Deliver Goods Sold is the additional cost of the goods if they can be obtained in the open market, but if not thus obtainable, the purchaser is entitled to recover the profits lost through the fault of the seller. (Mich.) *Kavanaugh Mfg. Co. v. Rosen*, 378.

5. SALES, EXECUTORY—Breach of Contract—Damages—Resale.—Under an executory contract of sale, the seller may retain the goods and sue for damages upon the purchaser's refusal to receive them, without reselling them. (S. C.) *Huguenot Mills v. Jempson & Co.*, 673.

6. SALES—Executory Contract—Breach.—Measure of Damages to the seller for a breach of an executory contract for the sale of goods, is the difference between the contract price and the market price at the time the goods should have been accepted by the purchaser. (S. C.) *Huguenot Mills v. Jempson & Co.*, 673.

7. DAMAGES, Measure of—General Rule.—He who breaks a contract is liable to compensate the other party for all damages occasioned by the breach which might reasonably be expected to flow therefrom under ordinary circumstances or peculiar circumstances of which the contractor is informed at the breach of the contract. (Wis.) *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 971.

8. DAMAGES must be Limited to those which the reasonable diligence of the other contracting party could not avert. (Wis.) *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 971.

9. DAMAGES, Measure of.—In Case of the Failure to Deliver a Commodity Purchased in the Open Market the general damages are limited to the difference between the market price and the contract price, because by reasonable diligence the articles contracted for may be obtained at their market price. (Wis.) *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 971.

10. SPECIAL DAMAGES must not be so Uncertain or Conjectural that they cannot with practical safety be ascertained. (Wis.) *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 971.

11. DAMAGES—Loss of Prospective Profits.—If the contemplated result of the breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Only when the estimate of prospective profits involves such a degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should the courts reject it, if loss of profits is the result of the breach of the contract. (Wis.) *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 971.

12. DAMAGES, Failure to Lessen, When Excusable.—If, after entering into a contract for the purchase of springs to be used in the construction of vehicles, the purchaser omits to make efforts to purchase them elsewhere, his omission is excusable and does not diminish his right to recover damages, if he relied on the seller's assurance that he would be able to furnish them before they could be obtained elsewhere, and they were not purchasable in the open market and were of designs specially adapted to the purchaser's business and obtainable only by special order from some manufacturer. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

13. DAMAGES—Loss of Profits of Business.—Under a contract to manufacture and deliver springs to be used on vehicles to be constructed in the purchaser's factory, if the seller is guilty of a breach of contract, the purchaser is entitled to recover as damages the difference between the cost of manufacture and the selling price of such number of vehicles as the seller would have, with reasonable certainty, produced and have been able to sell during the current season, if the seller had knowledge of such a state of facts with reference to the purchaser's business or the business of manufacturing vehicles generally that the seller should have, as a reasonable man, contemplated that such injury might probably result from the failure to supply the springs at the time required by the contract. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

14. DAMAGES—Loss of Use of Factory.—If a seller of materials known to be necessary for the use of a factory fails to deliver them at the time stipulated in the contract, he is liable in damages for the breach of the contract for the value of the use of the factory so far as such use was prevented by such breach. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

15. DAMAGES for Loss of, or Interruption to, Business.—Where a business has been long established, past experience may establish, with sufficient certainty, what would have been the course and result of that business during a certain period of interruption, and hence damages may be allowed for such interruption resulting from a breach of contract to sell materials without which the business could not be carried on and the absence of which led to the interruption. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

16. DAMAGES—Losses and Expenses Due to an Effort to Avert Damages.—Where there has been a breach of a contract to sell materials necessary to the operation of a factory, there may be allowed as damages, in addition to the lost use of the factory, the expenses of any efforts made by the purchaser consistent with due and reasonable diligence to avert general damages and in the way of efforts to expedite the delivery of the articles under the contract and to find and purchase other materials to supply the place of those which the seller did not deliver in time, together with the necessary cost of any other materials so purchased. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

17. DAMAGES, Effect of Defendant's Knowledge that Damages would Probably Result from His Breach of a Contract.—One who sells a manufacturer parts of vehicles within a fixed time for delivery must contemplate that their nondelivery at the time stipulated would inconvenience and disarrange the system of manufacturing, especially if he is familiar with the conduct of such factories generally. Hence, in an action to recover damages for nondelivery, evidence may be received to prove the knowledge of the seller and his agents as to the operation of such manufacturing plants or of special information as to the purchaser's situation and as to his sales, either

made or prospective, although the information did not extend to all the details, such as the persons to whom and the prices at which sales had been, or were expected to be, made. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

18. **DAMAGES.—Evidence of the Custom of Operating a Factory** should be received in an action for a breach of contract by which such operation was, for a time, necessarily suspended, if such evidence tends to prove the manner in which, or the extent to which, such breach interrupted such operation or diminished its efficiency. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

19. **DAMAGES, Evidence Admissible to Prove.**—In an action for a breach of a contract to sell and deliver materials evidence should be received to prove even general knowledge on the part of the seller as to how the purchaser's business was carried on either in manufacturing, selling or obtaining necessary supplies of material, whether such knowledge was derivable from the seller's general familiarity with the business or from facts communicated to him at or prior to the making of the contract. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

20. **DAMAGES, Evidence of in an Action for the Breach of a Contract.**—In an action to recover damages for failure to furnish certain springs to be used as parts of vehicles, evidence of the actual effect of their absence after the time at which they were agreed to be furnished is admissible. This may involve the extent to which men were kept in idleness in the purchaser's factory and the efficiency of their labor impaired and the nonutility or lessened utility of any springs received from the seller after the contract period, and especially after the close of the season; also of the capacity of the shop during the period of complete or partial interruption of business after the springs were due, confined, however, to that which was ordinary and usual. But evidence should not be received of the money value of the time of the men lost by reason of want of such springs. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

21. **DAMAGES—Evidence Admissible to Prove.**—In an action to recover damages for the failure to furnish a manufacturer springs to be used as parts of vehicles, evidence is admissible to show that he had a sufficient supply of materials and parts of vehicles other than springs and all labor to keep his factory running to an extent not exceeding that which was usual and customary, and that sales had been made in excess of what the factory was able to produce with the shortage of springs due to such breach, provided such sales did not exceed such as should have been within the reasonable contemplation of the parties, but evidence should not be received of the profits of specific vehicles included in such orders. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

22. **DAMAGES—Evidence that a Party Suffering from the Breach of a Contract could not have Lessened His Damages by Reasonable Diligence.**—In an action to recover damages for the breach of a contract to supply certain materials, evidence is admissible to prove that the purchaser could not, by reasonable diligence, supply himself with such materials merely by paying an enhanced price. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

23. **DAMAGES—Evidence of Diligence on the Part of the Person Suffering from the Breach of a Contract.**—In an action to recover damages for the breach of a contract to deliver springs to be used by a manufacturer of vehicles, evidence is admissible to show diligence exercised by him after he had reasonable ground to believe that

the seller would default in seasonable delivery, in the way of attempts to obtain such springs elsewhere or to expedite shipments from the seller's place of manufacture, and also to show the representations and promises on the part of the latter which might have induced him to forego efforts which he would otherwise have made. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

24. **DAMAGES for the Breach of a Contract—Expenses.**—One who is guilty of the breach of a contract to supply certain materials is liable in damages for the expenses incurred by the other party in a reasonably diligent effort to obtain such materials elsewhere. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

25. **DAMAGES.**—Evidence of Willfulness on the Part of a Person Guilty of the Breach of a Contract is not admissible in an action to recover damages therefor. Motive can neither create nor increase his liability in an action founded on such breach. (Wis.) Kelley, Maus & Co. v. La Crosse Carriage Co., 971.

See Constitutional Law, 1; Frauds, Statute of; Water and Water-courses, 5, 6.

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SCHOOLS AND SCHOOL DISTRICTS.

1. SCHOOLS—Authority of Teacher—Negligence.—An act done by a school teacher, in the exercise of his authority to correct his pupil, and not prompted by malice, is not actionable, though it may cause a permanent injury, unless a person of ordinary prudence could have reasonably foreseen that a permanent injury of some kind would naturally or probably result from the act. (N. C.) *Drum v. Miller*, 528.

2. SCHOOLS—Liability of Teacher for Negligent Injury to Pupil.—In order to render a school teacher liable for permanent injury inflicted on a pupil wrongfully in an attempt to correct him, it is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen, but it is sufficient if, by the exercise of reasonable care, the teacher might have foreseen that some injury would result from his act. (N. C.) *Drum v. Miller*, 528.

3. SCHOOLS—Liability of School Teacher for Injury to Pupil.—A school teacher is liable if he inflicts personal, permanent injury upon a pupil in attempting to enforce the discipline of his school, and in so doing fails to exercise ordinary care, and the injury is the natural and probable result of his negligence which he should have foreseen in the light of surrounding circumstances, and in the exercise of ordinary care. (N. C.) *Drum v. Miller*, 528.

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SEDUCTION.

SEDUCTION—Limitation of Actions.—A Father's cause of action for the seduction of his daughter arises when the act of seduction is complete, and not when he discovers that she has been seduced. (Ga.) *Davis v. Boyett*, 118.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE.—It is No Defense to specific performance of one's contract, otherwise fair, to sell an undivided interest in his land, that his vendee may sell the interest to some undesirable person. (Ky.) *Moayon v. Moayon*, 303.

STATUTE OF FRAUDS.

See *Frauds, Statute of.*

STATUTE OF LIMITATIONS.

See *Limitation of Actions.*

STATUTES.

1. **STATUTES—Legislative Journals.**—Courts Take Judicial Notice of the contents of the journals and other records of legislative bodies, required to be kept by the fundamental law, which may in any manner affect the validity or the meaning and construction of an act. (Or.) *Portland v. Yick*, 633.

2. **STATUTES—Enactment of—Legislative Journals.**—Courts will not look behind an enrolled bill having the signatures of the presiding officers of the two Houses and filed in the office of the Secretary of State, except to determine whether it appears affirmatively from the records of those bodies that the mandatory provisions of the constitution have not been observed in the enactment; and, unless it does so appear, the law will not be declared invalid. (Or.) *Portland v. Yick*, 633.

3. **STATUTES.**—One Who Seeks the Benefit of a Statute must, by averment and proof, bring himself within its provisions. (Ind.) *Indianapolis etc. Transit Co. v. Foreman*, 185.

See *Constitutional Law.*

STREET RAILROADS.

1. **STREET RAILWAYS.**—It is the Duty of a Street Railway to Receive any Coin or Bill not in excess of the amount permitted to be tendered for fare on its cars under its rules and regulations, and

to make and return change, and the refusal of its conductor to return change is a tortious act performed while acting in the line of his duty for which his employer is answerable. (N. Y.) Gillespie v. Brooklyn Heights R. R. Co., 503.

2. STREET RAILWAYS, Liability of or Insulting Remarks of Conductor to Passenger Respecting Change Due.—If a conductor receives a coin in excess of the amount due for a passenger's fare, and, being asked for the change, denies that any is due, and proclaims in the presence of other persons that the claimant is a deadbeat and swindler whereby she is occasioned suffering, humiliation, wounded pride and disgrace, she is entitled to recover of the corporation damages in excess of the amount wrongfully retained by the conductor. (N. Y.) Gillespie v. Brooklyn Heights R. R. Co., 503.

3. STREET RAILWAYS, When Liable in Tort.—Any passenger rightfully on the cars of a street railway is entitled to protection by the carrier, and any breach of his duty in this respect is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of contract. (N. Y.) Gillespie v. Brooklyn Heights R. R. Co., 503.

4. STREET RAILWAYS—Damages Recoverable from for Insulting Conduct of Employees.—Where a street-car conductor, on being asked for change due to a passenger, falsely proclaims in the presence of others that she is a deadbeat and swindler, among the elements of compensatory damages recoverable for the wrong are the humiliation and injury to her feelings, not including punitive or exemplary damages. (N. Y.) Gillespie v. Brooklyn Heights R. R. Co., 503.

SUBSCRIPTIONS.

1. CONTRACTS.—Subscription Contracts are not of that class of contracts requiring a particular or formal delivery, nor is it necessary that the acceptor, or person who performs the act or does the thing for or toward which the subscription is to go, shall be in esse at the time the subscription is made in order that it shall be valid. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

2. SUBSCRIPTION CONTRACTS are Favored in Law as being calculated to foster and encourage public and quasi public enterprises, and performance is the only acceptance, or notice of acceptance required. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

3. SUBSCRIPTION CONTRACTS—Notice of Conditions.—Failure to give notice of certain conditions contained in a subscription contract made by a corporation, does not defeat a recovery thereon, if the corporation through its proper officers had actual notice of such conditions. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

4. SUBSCRIPTION CONTRACTS—Conditions—Construction.—A condition in a subscription contract that the subscriber will pay a certain sum per year during the time a certain corporation shall occupy a building to be erected, "said occupation to be continuous and free from rent, and said payments not to continue beyond the period of fifteen years," does not require such corporation to obtain a building lease for fifteen years, but limits the subscriber's liability to the time of actual occupation by the corporation, not exceeding fifteen years. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

5. SUBSCRIPTION CONTRACTS—Conditions—Construction.—A subscription contract providing that a certain corporation shall oc-

cupy a building, when erected, "rent free," is not violated by requiring such corporation to pay one dollar per year as rental for premises worth thirty thousand dollars per year. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

6. SUBSCRIPTION CONTRACT—Conditions—Ownership of Premises.—If a subscription contract specifies that the subscription is to be paid to the owner of the premises where a certain stock exchange is located, the ownership of the building and of the space occupied by such stock exchange is a sufficient compliance with the subscription contract, although such stock exchange building is erected on leased ground. (Ill.) Merchants' Building Imp. Co. v. Chicago etc. Co., 145.

SUMMONS.

See Process.

TAXATION.

1. TAXATION—Situs of Vessels.—The legal situs of vessels for the purposes of taxation is within the state, although they are owned by a nonresident steamship company and enrolled under a national statute at some port outside the state, and engaged in part in interstate commerce, if they ply entirely between ports within the state and act as adjuncts to the main line of ocean-going vessels of such company, for the purpose of delivering freight and passengers to it, although they issue bills of lading and tickets for through passage to points outside the state. (Va.) Old Dominion Steamship Co. v. Commonwealth, 855.

2. TAXATION.—Property otherwise taxable within the state is not exempt from taxation because it may have been returned for taxation for the same year in another state. (Wash.) Nathan v. Spokane County, 888.

3. CONSTITUTIONAL LAW—Poll Tax.—A statute providing that certain cities of a designated class may levy upon and collect from every male inhabitant between certain ages an annual street poll tax, but exempting members of voluntary fire companies from the payment of such tax, is unconstitutional and void, as not being uniform taxation, and long acquiescence in such statute cannot legalize it. (Wash.) State v. Ide, 914.

4. CONSTITUTIONAL LAW—Taxation.—The expediency of legislative enactments for the listing, assessment, levy, enforcement, and collection of taxes, within the limitations prescribed by the constitution, is within the discretion of the legislature, and constitutes a subject matter with which the courts will not intermeddle. (Wash.) Nathan v. Spokane County, 888.

5. CONSTITUTIONAL LAW—Taxation of "Migratory Stock."—A statute imposing a tax upon goods brought into the state after the time for assessing property, to be sold in a place of business, temporarily occupied, is not unconstitutional on account of making distinctions as to the manner of the assessment and collection of taxes levied against the different kinds of personal property. (Wash.) Nathan v. Spokane County, 888.

6. CONSTITUTIONAL LAW—Taxation—Due Process of Law—Hearing Before Assessor.—Under a statute providing for the taxation of goods brought into the state after the time for assessing property, and that the owner or person in charge of such property shall im-

mediately notify the assessor who shall then proceed to value the goods at their true value, upon which valuation the taxes for the then current year shall be assessed and collected, the person liable for such tax having an opportunity to submit evidence to the assessor, and to be heard with regard to the valuation of such property, the assessor acts in a judicial capacity, and the statute does not deprive a person of his property without due process of law, in that it fails to provide for a hearing in behalf of an aggrieved person whose property is sought to be charged with the tax. (Wash.) *Nathan v. Spokane County*, 888.

7. CONSTITUTIONAL LAW—Taxation—Immunities.—A provision in a "migratory stock tax" statute that the person paying such tax shall be allowed certain reductions from the next regular assessment of such property is unconstitutional and void as granting to such person an exemption or immunity which is denied to other like property owners of the same class, whose property is first listed for the next regular assessment. (Wash.) *Nathan v. Spokane County*, 888.

8. CONSTITUTIONAL LAW—Taxation—Statute Void in Part.—The fact that one provision of a tax statute is unconstitutional does not affect the validity of the remaining portions of such statute, providing they are distinct, separable, and complete in themselves. (Wash.) *Nathan v. Spokane County*, 888.

9. TAXES PAID by a Purchaser Under a Void Decree inure to the benefit of the former owner to prevent forfeiture by his nonentry for taxes. (W. Va.) *Waldron v. Harvey*, 959.

See Adverse Possession, 1.

TEACHERS.

See Schools and School Districts.

TELEPHONES AND TELEGRAPHS.

1. MUNICIPAL CORPORATIONS—Telephone Companies—Vested Rights.—The acceptance of the terms and conditions of an ordinance granting to a telephone company the use of the streets of a city constitutes a contract between the company and the city, and the construction of its line at large expense gives such company vested rights which the city cannot impair by granting to persons the use of such streets for private purposes or extraordinary uses. (N. Dak.) *Northwestern Tel. etc. Co. v. Anderson*, 530.

2. TELEPHONE COMPANIES—Wrongful Discontinuance of Service.—Measure of Damages against a telephone company for wrongfully disconnecting a telephone on account of a mistake as to the payment of rent, is such sum as will compensate its patron for the injury caused by the breach of the contract. He is not entitled to recover punitive damages. (Ky.) *Cumberland Tel. etc. Co. v. Hendon*, 290.

3. TELEPHONE COMPANIES—Wrongful Discontinuance of Service.—Measure of damages against a telephone company for wrongfully discontinuing its service to a patron is, in the absence of proof of specific loss, the amount paid for the service for the time during which it is refused. (Ky.) *Cumberland Tel. etc. Co. v. Hendon*, 290.

TENANCY IN COMMON.

COTENANCY—Right to Maintain Ejectment.—A tenant in common of real estate may maintain ejectment and recover posses-

sion of the entire tract as against strangers to the title. (N. Dak.) *Griswold v. Minneapolis etc. Ry. Co.*, 572.

TICKETS.

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TORTS.

1. **TORTS—Negligence.**—If a willful wrong or a negligent act is committed which produces an injury, the wrongdoer is liable, provided, in the latter case, he could have foreseen that harm might follow as a natural and probable result of his act. (N. C.) *Drum v. Miller*, 528.

2. **RELEASE** of One Joint Tort-feasor releases the others, although it is agreed that they shall not be discharged. (Mich.) *McBride v. Scott*, 416.

TRADE NAME.

1. **TRADE NAMES—Injunction.**—Generic or Descriptive Words used in different trade names will not be enjoined, except upon allegation and proof of actual fraud, or fraud resulting from the similarity of names, tending to lead those dealing with the persons adopting such trade name to believe that they are one and the same, even though they use ordinary care to discriminate between them. (Ill.) *Koebel v. Chicago Landlords' etc. Bureau*, 154.

2. **TRADE NAMES—Injunction.**—The use of descriptive words in a trade name will be enjoined by an older concern adopting very similar words as a trade name, even though the defendant is not guilty of intentional fraud in adopting his trade name if the striking similarity in the names has resulted in embarrassment and injury to the complainant. (Ill.) *Koebel v. Chicago Landlords' etc. Bureau*, 154.

TREASURE-TROVE.

See Finding Lost Property.

TRESPASS.

See Limitation of Actions, 4, 5.

TRESPASSERS.

See Railroads, 3-10.

TRIAL.

1. **TRIAL—Invasion of Province of the Jury.**—A recital by the court in its instructions to the jury of numerous facts as to which the evidence was all one way is not an invasion of the province of the jury. (Wis.) *Cupps v. State*, 996.

2. **TRIAL—Mistake of Court in Stating Evidence, When not Prejudicial.**—A statement by the court in an instruction to the jury on a trial for murder that the accused and a companion walked when

returning to a particular place, when the evidence shows that they ran, is not prejudicial, when the inference to be drawn from their walking must necessarily be more favorable to the accused than from their running, as where from all the evidence being one way the jury must have understood the court merely to mean that such return was on foot. (Wis.) *Cupps v. State*, 996.

3. **TRIAL by Jury—Omission of Charge upon a Subject When No Request Therefor has been Made.**—Where the charge of the court does not cover all the phases of the case, counsel must call its attention to the omission by an appropriate request, or be precluded from making such failure available as reversible error. A merely oral request is not sufficient. Counsel must present an additional instruction in writing on any particular point upon which he desires the court to charge. (Wis.) *Cupps v. State*, 996.

4. **TRIAL—Practice—Waiver of Exception.**—If the trial court in charging the jury commits error in stating that the defendants admit certain facts, attention must be called to it at the time, or an exception thereto is waived. (S. C.) *State v. Still*, 657.

5. **TRIAL—Finding of Facts, When not Necessarily Inferable.**—Though a witness testifies that when certain notes matured, he was solvent and able to pay them, but afterward became insolvent and unable to pay them, it is not a conclusion of law that he was ever solvent or that any suit against him on the notes would have resulted in their payment. (Mass.) *Olds v. City Trust etc. Co.*, 356.

See Homicide, 17-21.

TROVER AND CONVERSION.

See Pledges.

UNITED STATES.

1. **UNITED STATES—Power of Attorney to Prosecute Claim Against.**—An irrevocable power of attorney to prosecute a claim against the United States, executed before the allowance of the claim, is void under section 3477 of the Revised Statutes. (Miss.) *Knut v. Nutt*, 452.

2. **UNITED STATES—Contract to Prosecute Claim Against.**—A contract by an attorney to prosecute a claim against the United States "through any diplomatic negotiations" that may be deemed for the best interests of the client is not, because of the use therein of such words, void on its face. (Miss.) *Knut v. Nutt*, 452.

3. **UNITED STATES—Prosecuting Claim Against for Part of Recovery.**—An agreement by an attorney to prosecute a claim against the United States for "a sum equal to thirty-three and one-third per cent of the amount which may be allowed" thereon, is not within section 3477 of the Revised Statutes declaring that transfers of claims against the United States before their allowance shall be void. (Miss.) *Knut v. Nutt*, 452.

UNLAWFUL ENTRY.

See Forcible Entry and Detainer.

VENDOR AND VENDEE.

1. **VENDOR'S REMEDIES—Estoppel by Election.**—An unsuccessful suit by a vendor to set aside a sale of land for fraud does not,

because of the inconsistency of the remedies, estop him from enforcing a vendor's lien. (Ind. App.) *McCoy v. McCoy*, 223.

2. FALSE REPRESENTATIONS—Failure to Examine Records.—If one person falsely represents that a trust deed is a first lien on premises, intending that another shall act on such representation, and the latter is thereby induced so to act to his injury, the first person cannot escape liability, although an examination of the records would have disclosed the falsity of such representation. (Ill.) *Kehl v. Abram*, 158.

See Frauds, Statute of.

VENUE.

VENUE—Want of, How Taken Advantage of.—If the declaration in an action for personal injuries shows the jurisdiction of the court, the defendant cannot allow the suit to proceed to judgment and then complain that the cause of action did not arise in the county in which the venue is laid. If he proposes to contest the jurisdiction of the court on that ground, he must give notice of it by plea in abatement. (W. Va.) *Snyder v. Philadelphia Co.*, 941.

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See Sales; Waters and Watercourses, 5, 6.

WATERS AND WATERCOURSES.

Riparian Rights.

1. A RIPARIAN OWNER is Entitled to the reasonable use of the water flowing in a natural stream over his premises. He may use it for domestic purposes both in his house and barn and consume it for the support of his horses, cattle and poultry, and may temporarily detain it by dams in order to furnish power to run machinery and for the purpose of irrigating his lands, when the amount used is reasonable and not out of proportion to the size of the stream. He may also construct ornamental ponds and store them with fish, so long as the size of the ponds is not so large as to materially diminish by evaporation and absorption the quantity of water usually flowing in the stream. (N. Y.) *Pierson v. Speyer*, 499.

2. AN UPPER RIPARIAN OWNER has the Right to the First Reasonable Use of the Water flowing through a stream, taking into consideration its size and velocity. (N. Y.) *Pierson v. Speyer*, 499.

3. RIPARIAN OWNERS—What Use of Water is not Presumed to be Unreasonable in the Absence of Findings to that Effect.—Where an upper riparian proprietor constructs a dam across a stream on his own premises, thereby creating a reservoir one and a half acres in extent and impounding the water therein for both ornamental and domestic purposes, exposing a much larger surface to the sun and air than otherwise would have been exposed, and the increased evaporation and absorption cause the water to cease flowing on the lands of a lower proprietor, depriving him of the use of them

to which he was entitled, it was held that an injunction against continuing the dam was not sustainable, in the absence of a specific finding that the use of the water made by the upper proprietor was unreasonable. (N. Y.) *Pierson v. Speyer*, 499.

Damages from Overflow.

4. **TRESPASS**—Damages for Overflow of Land.—Negligently allowing water to escape from a canal lawfully constructed, so as to overflow the land of another, creates a liability for consequential damages, recoverable in an action on the case, but not in an action of trespass. (Wash.) *Suter v. Wenatchee Water Power Co.*, 881.

Warranty of Quality of Water.

5. **SALE OF WATER**—Implied Warranty of Quality.—If one contracts to deliver water to another for mining purposes, the law implies a warranty that the water shall at least not be unfit for the required purpose on account of the contractor's own conduct. (Or.) *Gold Ridge Min. Co. v. Tallmadge*, 602.

6. **SALE OF WATER**—Waiver of Warranty of Quality.—If one contracts to deliver water to another for mining purposes, and the water proves unfit for that purpose, a compliance with the contract is not waived by an attempted use under protest and in reliance of a promise to correct the difficulty. (Or.) *Gold Ridge Min. Co. v. Tallmadge*, 602.

See Navigable Waters; Nuisance.

WAY OF NECESSITY.

See Easements.

WEAPONS.

See Homicide, 1.

WHARVES.

See Navigable Waters, 6.

WILLS.

In General.

1. **WILLS**—Construction of Devise.—A devise by a testator of his lands south of a certain line, "containing, by estimation, two hundred acres," carries with it lands subsequently purchased by him south of such line. (N. C.) *Brown v. Hamilton*, 526.

2. **ESTATE** upon Condition, When Created.—A will devising property to F. J. B., "provided that she shall take care of and look after me while I live," describes an estate upon condition precedent rather than an absolute estate. (Mass.) *Brennan v. Brennan*, 363.

3. **WILLS**—Devise upon Condition Precedent, Absence of Knowledge of the Condition upon the Part of the Devisee.—If a testatrix devises all of her real property to one of her nephews, provided he takes care of her and looks after her while she lives, no estate vests in him if he does not comply with this condition, though he did not know of it until after her death. (Mass.) *Brennan v. Brennan*, 363.

Revocation.

4. **WILL**—Revocation Presumed from Cancellation.—When a will is found among the effects of the testator, with pencil lines drawn

through some of its material parts and blank slips pasted over others, it is presumed that he made the cancellations and obliterations, and intended them to operate as a revocation. (Ga.) *McIntyre v. McIntyre*, 71.

5. **WILL—Revocation Presumed from Pencil Lines.**—When a will with lead pencil cancellations is produced, it is presumed that they were made by the testator; and it is upon the party claiming that they were deliberative, and not final, to establish that fact. (Ga.) *McIntyre v. McIntyre*, 71.

6. **WILL—Revocation—A Joint Operation of Act and Intention** is necessary to revoke a will. (Ga.) *McIntyre v. McIntyre*, 71.

7. **WILL—Revocation—Intention to Make a New Will.**—If the cancellation of a will and the making of a new one were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will is not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way; but if the act of revocation is completed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing. (Ga.) *McIntyre v. McIntyre*, 71.

See Conditions.

Note.

Wills, agreements to make, whether and when within the statute of frauds, 240, 241.

WITNESSES.

In General.

1. **WITNESS—Interest Does not Disqualify** a witness in Georgia, since the passage of the evidence act of 1866, but goes merely to his credit. (Ga.) *McIntyre v. McIntyre*, 71.

2. **PRACTICE—A Part of the Answer of a Witness may be Excluded**, on the ground that it is not responsive to the question asked him. (Mass.) *Chicago Title etc. Co. v. Smith*, 350.

3. **TRIAL—Answer to Question, When may be Stricken Out as not Responsive.**—If a witness, on being asked as to the reputation of an accused as a peaceable, law-abiding citizen, answers, "In every respect it was good," the answer may be stricken out so far as not responsive to the question asked. (Wis.) *Cupps v. State*, 996.

Impeachment.

4. **EVIDENCE—Impeachment of Witness.**—If evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence is inadmissible. (Tenn.) *Legere v. State*, 781.

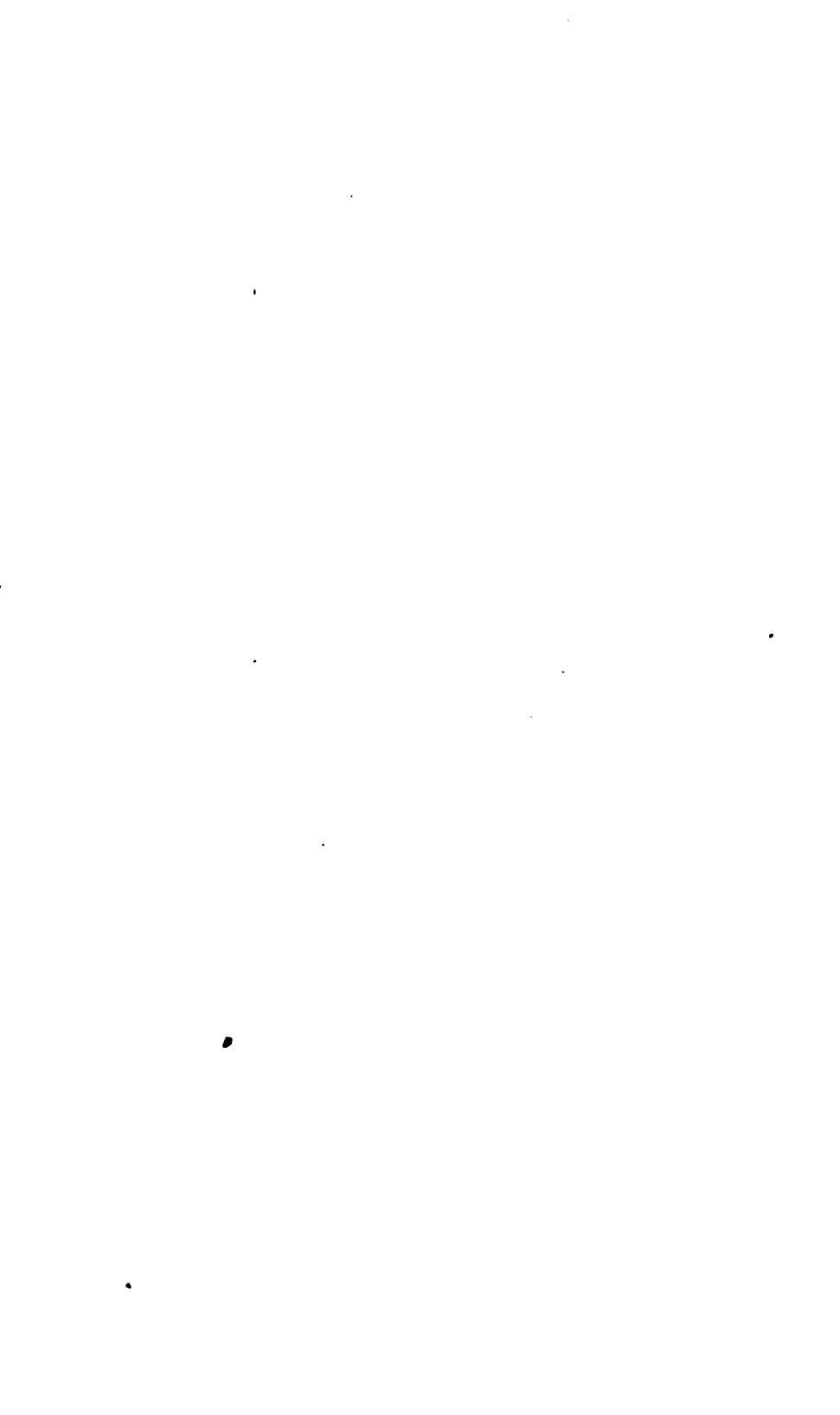
5. **EVIDENCE—Impeachment of Witness.**—If it is charged that the testimony of a witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive of personal interest, it may be supported by showing that he made a similar statement before that relation or motive existed. (Tenn.) *Legere v. State*, 781.

6. **EVIDENCE—Impeachment of Witness.**—If a witness is impeached by proof of contradictory statements, confirmatory and consistent statements made by him after making such contradictory statements are not admissible in support of his impeached testimony. (Tenn.) *Legere v. State*, 781.

7. **WITNESSES—Evidence to Impeach.**—If evidence of a contrary statement by a witness is offered to impeach him, it is not competent, in reply, to admit evidence that the witness has on other occasions made statements similar to the one testified to, except when it is charged that there is a disposition to misstate in consequence of a change of relation to a party or to the cause, and then it may be shown that the witness made similar statements before such relation existed. (S. C.) *State v. McDaniel*, 661.

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